DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1175
Title: Olivea Marx, Petitioner
v.
General Revenue Corporation
Docketed: March 28, 2012
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (10-1363)
Decision Date: December 21, 2011
Rehearing Denied: January 30, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Mar 23 2012	Petition for a writ of certiorari filed. (Response due April 27, 2012)
Apr 27 2012	Brief amicus curiae of National Consumer Law Center filed.
Apr 27 2012	Brief of respondent General Revenue Corporation in opposition filed.
May 3 2012	Reply of petitioner Olivea Marx filed.
May 8 2012	DISTRIBUTED for Conference of May 24, 2012.
May 29 2012	Petition GRANTED limited to Question 1 presented by the petition.
May 30 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and July 27, 2012.
May 30 2012	The time to file respondent's brief on the merits is extended to and including September 10, 2012.
Jul 23 2012	SET FOR ARGUMENT ON Wednesday, November 7, 2012.
Jul 27 2012	Joint appendix filed. (Statement of costs filed)
Jul 27 2012	Brief of petitioner Olivea Marx filed.
Aug 1 2012	Record received from U.S.C.A. for 10th Circuit. (1 box)
Aug 3 2012	Brief amicus curiae of the United States filed.
Aug 3 2012	Brief amici curiae of AARP, et al. filed.
Aug 6 2012	Record from U.S.D.C. for District of Colorado is electronic.
Aug 24 2012	CIRCULATED.
Sep 5 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 10 2012	Brief of respondent General Revenue Corporation filed. (Distributed)
Sep 17 2012	Brief amicus curiae of ACA International filed. (Distributed)
Sep 17 2012	Brief amicus curiae of National Association of Retail Collection Attorneys filed. (Distributed)

Oct 9 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 10 2012	Reply of petitioner Olivea Marx filed. (Distributed)
Nov 7 2012	Argued. For Allison M. Zieve, Washington, D. C.; and Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Lisa S. Blatt, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAR 23 2012
OFFICE OF THE CLERK

No. 11-1175

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID M. LARSON
88 Inverness Circle East
Suite 1-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

March 2012

QUESTIONS PRESENTED

1. The Fair Debt Collection Practices Act (FDCPA) provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Federal Rule of Civil Procedure 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

The first question presented is whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment."

2. The FDCPA defines "communication" as "conveying of information concerning a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The statute generally bars debt collectors from communicating "in connection with the collection of any debt, with any person other than the consumer." *Id.* § 1692c(b). An exception to this bar allows a debt collector to "communicat[e]" with a debtor's employer solely to acquire "location information" about the debtor, but provides that a location information inquiry shall "not state that [the] consumer owes any debt" and not "indicate[] . . . that the communication relates to the collection of a debt." *Id.* § 1692b.

The second question presented is whether the FDCPA's strict limits on communications with third parties cease to apply when a debt collector, contacting a third party in connection with the collection of a debt, does not indicate the reason for the communication.

PARTIES TO THE PROCEEDING

Petitioner is Olivea Marx.

Respondent is General Revenue Corporation.

Kevin Cobb was an additional defendant in the district court but was not a party to the appeal.

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INTRODUCTION

This case raises two significant questions about the Fair Debt Collection Practices Act (FDCPA). First, the Tenth Circuit below recognized that an award of costs to a prevailing defendant under the FDCPA is limited to cases "brought in bad faith and for the purpose of harassment." The court nonetheless held that the FDCPA does not preclude an award of costs under Rule 54(d), which provides for an award of costs to a prevailing party, "[u]nless a federal statute . . . provides otherwise." This holding directly conflicts with a holding of the Ninth Circuit in an FDCPA case and conflicts with a holding of the Seventh Circuit in an analogous case.

Second, the FDCPA protects consumers from abusive and deceptive debt collections practices, primarily by imposing requirements and restrictions on debt collectors' "communications" with consumers and third parties, such as neighbors and employers. Adopting a narrow reading of the word "communications," the court below held that a debt collector is not subject to the FDCPA's strict limitations on communicating with third parties if the debt collector, although contacting a third party "in connection with the collection of any debt," does not indicate the reason for making contact. The Tenth Circuit's holding contradicts the federal regulators' and district courts' settled understanding of the FDCPA, is contrary to the text, structure, and purpose of the Act, and undermines its important protections.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is not yet reported in the Federal Reporter. It is available on Westlaw at 2011 WL 6396478, and reproduced in the appendix at 1a. The judgment of the

United States District Court for the District of Colorado is unreported and is reproduced in the appendix at 30a. The district court's order denying post-judgment motions of both parties is unreported. It is available at 2010 WL 2802550, and reproduced in the appendix at 28a.

JURISDICTION

The court of appeals entered its judgment on December 21, 2011. On December 30, 2011, the court of appeals granted a motion to extend the time to file a petition for rehearing until January 19, 2012. On January 30, 2102, the court denied petitioner's timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 803 of the FDCPA, 15 U.S.C. § 1692a, entitled "Definitions," provides in relevant part:

> (2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
>
> . . . .
>
> (7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

Section 804, 15 U.S.C. § 1692b, entitled "Acquisition of location information," provides:

> Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—
>
> (1) identify himself, state that he is confirming or correcting location information concerning the

> consumer, and, only if expressly requested, identify his employer;
>
> (2) not state that such consumer owes any debt;
>
> (3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
>
> (4) not communicate by post card;
>
> (5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
>
> (6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

Section 805, 15 U.S.C. § 1692c, entitled "Communication in Connection with Debt Collection," provides at subsection (b), entitled "Communication with Third Parties":

> Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary

> to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

Section 813, 15 U.S.C. § 1692k, entitled "Civil liability," provides in relevant part:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure; [or]
>
> (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000[.]
>
> . . . and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act

This petition arises from an action under the FDCPA brought by petitioner Olivea Marx against respondent General Revenue Corporation (GRC). Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), which had risen to the level of "a widespread and serious national problem." S. Rep. 95-382, at 2 (1977). The FDCPA's objective is carried out largely by restricting the ways in which debt collectors can communicate as part of their debt-collection activities.

The statute defines "communication" to mean "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). It restricts when and how debt collectors may communicate with consumers themselves, *see id.* §§ 1692c(a), (c), 1692e(8), (9), (11), & 1692f(7), (8); and how debt collectors may communicate with third parties, *see id.* §§ 1692b & 1692c(b). It also affirmatively requires the communication of certain information to consumers, *see id.* § 1692g(a); and it prohibits false and misleading communications, *see id.* § 1692e. The scope of "communication" is thus the linchpin of the statute, as the FDCPA's effectiveness in curbing abusive debt collection practices depends on restricting "communications."

The FDCPA generally prohibits a debt collector from communicating with any person other than the consumer in connection with the collection of any debt. *Id.* § 1692c(b). An exception to the prohibition allows a debt collector to communicate with people other than the consumer "for the purpose of acquiring location information about the

consumer," *id.* § 1692b, and the statute defines "location information" as "a consumer's place of abode and his telephone number at such place, or his place of employment." *Id.* § 1692a(7). As both the federal regulators and debt collectors agree, a debt collector may not contact an employer to ask for location information if the collector already has it and may not use the excuse of requesting location information to ask for additional information.[1] If a debt collector makes contact to acquire location information, he may not state that the consumer owes any debt or indicate that he is in the debt collection business. *Id.* § 1692b(2), (5). Rather, he must "state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer." *Id.* § 1692b(1).

In a civil case brought by a consumer alleging a violation of the FDCPA, the statute provides that a prevailing plaintiff may recover actual damages, statutory

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[1] *See* CFPB, *Supervision and Examination Manual* at FDCPA 2-3 (Oct. 2011), *available at* www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf (stating that, with exceptions not pertinent here, debt collector may not "contact" third parties when trying to collect a debt, except that "a debt collector who is unable to locate a consumer may ask a third party for the consumer's" location information); OCC, *Other Consumer Protection Laws and Regulations (Comptroller's Handbook)* at 24 (Aug. 2009), *available at* www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf (same); Federal Reserve Board, *Consumer Compliance Handbook* at FDCPA 2 (Jan. 2006), *available at* www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf (same); Ass'n of Credit and Collection Professionals, *Guide to the FDCPA* 62-63 (2009-10 ed.) ("only" information debt collector can request from third party is location information), *attached as* Exh. B to CFPB Tenth Cir. Amicus Br.

damages of up to $1,000, and "the costs of the action, together with a reasonable attorney's fee as determined by the court." *Id.* § 1692k(a). On the other hand, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Id.* § 1692k(a)(3).

Factual Background and Proceedings Below

Ms. Marx sued GRC, "one of the largest collection agencies in the country," www.generalrevenue.com/aboutus.htm, alleging several violations of the FDCPA. Among other things, she alleged that GRC violated § 1692c(b) by seeking information other than permitted "location information" when it communicated with her employer in connection with the collection of a student-loan debt. The communication consisted of a fax to Ms. Marx's employer that included GRC's name, logo, and address, its internal identification number for Marx's account, and stated "Sallie Mae" in the fax information line at the top of the page. The fax requested the employer's address and corporate payroll address, Marx's date of hire, whether she was full or part time, and her position. *See* Tenth Cir. App. 113 (copy of fax).

The district court dismissed Ms. Marx's claim, holding that the fax did not violate § 1692c(b)'s bar on communicating with third parties "in connection with the collection of a debt" because it was not a "communication" at all. The court suggested that a debt collector can contact an employer to ask for information in addition to "location information," as long as the employer does not know that the request is coming from a debt collector. *See* Pet. App. 33a-34a. The court held that, absent evidence that the employer understood the fax to be from a debt collector,

the fax did not "convey information regarding a debt" and therefore was not a communication under the FDCPA. *See* Pet. App. 33a-34a. The judgment later entered by the court ordered Ms. Marx to pay GRC's costs under Federal Rule of Civil Procedure 54(d). *Id.* 31a. The court rejected Ms. Marx's argument that the FDCPA limited an award of costs to the defendant to cases brought in bad faith and for the purpose of harassment, holding that the statutory language applies only to an award of attorney's fees. *Id.* 28a-29a. The court further held that an award of costs would be appropriate under Rule 68. *Id.* 29a.

Ms. Marx appealed both the ruling that there was no "communication" and the award of costs. The Tenth Circuit affirmed on both issues, with Judge Lucero dissenting. First, the court held that the fax was not a "communication" within the meaning of the FDCPA because it did not "indicate" that it concerned a debt. The court held that GRC's name and the account number on the fax were insufficient to make the fax a "communication," absent evidence that Ms. Marx's employer understood the fax to be about a debt. Pet. App. 5a. Notwithstanding the concerns expressed by Congress in placing strict limits on debt collectors' third-party communications, the court characterized the fax as "innocuous, nondescript, and harmless." *Id.* at 16a.

The court "concede[d]" that its holding rendered § 1692b(5) "superfluous." *Id.* 17a. That section bars a debt collector seeking location information from using "any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt" when contacting a third party to obtain location information. *See supra* p. 3. Under the Tenth Circuit's

holding, a communication that complies with § 1692b(5) would, by definition, not be a communication at all and, thus, not be subject to § 1692b's limits on communications seeking location information in the first place. Nor would it be subject § 1692c(b)'s prohibition against third party communications.

Second, the court affirmed the award of costs under Rule 54(d) (but rejected GRC's Rule 68 theory). Rule 54(d) permits the prevailing party to recover costs "[u]nless a federal statute . . . provides otherwise." The FDCPA provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). The court of appeals rejected GRC's argument that the reference to "costs" was merely part of a standard for determining the amount of attorney's fees awarded to a defendant (that is, that they must be "reasonable in relation to fees and costs"). *See* Pet. App. 7a. Rather, the court read "the bad-faith-and-harassment provision of § 1692k(a)(3) to indicate two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" *Id.*

Nonetheless, the court later contradicted itself by stating that "only" an award of attorney's fees "is linked to a finding that the action has been brought by the plaintiff in bad faith." *Id.* 18a. As to costs, the court held that the § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to the costs of suit as a matter of course," *id.* 8a, and thus that the FDCPA does not supersede Rule 54(d). That is, although initially adopting a reading of the statute under which § 1692k(a)(3) does "provide otherwise" than

Rule 54(d), the court held that Rule 54(d) was an appropriate basis for awarding costs, primarily because the court did not agree that good faith should relieve a consumer from paying the defendant's costs. *See* Pet. App. 9a, 14a.

The court of appeals expressly recognized that its decision conflicts with the Ninth Circuit's decision in *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010). That case held that § 1692k(a)(3) allows the defendant in an FDCPA case to recover costs only "on a finding . . . that the action was brought in bad faith and for the purpose of harassment." *Id.* at 701, 706.

Judge Lucero dissented on both issues. Finding that the fax "plainly" conveyed "information regarding a debt" (whether or not the recipient knew that it did), he would have held that the fax met the FDCPA definition of a communication. He explained that the majority decision added a new requirement, not contained within the FDCPA itself, that the communication not only must convey information regarding a debt, but, in addition, the recipient must understand it to do so. Pet. App. 21a. "[T]his extra requirement is not contained in the statutory text, and its addition to the FDCPA's definition of 'communication' violates several rules of statutory construction," he wrote. *Id.* 21a-22a. For example, Judge Lucero explained that the majority's reading renders § 1692b(5)—which bars debt collectors seeking location information from third parties from indicating that the "communication relates to the collection of a debt"—superfluous. Pet. App. 23a.

As to the award of costs, Judge Lucero found the FDCPA to be "clear and unambiguous" that an award of costs to the defendant is permitted only on a finding that the case was brought in bad faith and for the purpose of

harassment. *Id.* at 24a. Because the district court made no such finding in this case, Judge Lucero would have reversed the award of costs.

Ms. Marx filed a petition for rehearing or rehearing en banc. Her petition was supported by the Consumer Financial Protection Bureau (CFPB), which filed an amicus brief explaining why the panel majority was wrong on both issues and how its holdings undermined the protections of the FDCPA. The petition was denied.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Regarding Awards Of Costs To Prevailing Defendants Conflicts With Authority From The Seventh And Ninth Circuits.

Federal Rule of Civil Procedure 54(d), on which the Tenth Circuit relied to impose costs, does not permit an award of costs to a prevailing party if a federal statute "provides otherwise." The FDCPA is such a statute: it provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3).

Here, the Tenth Circuit held that § 1692k(a)(3) does not "provide otherwise" than Rule 54(d). Although the court acknowledged at one point that the text of § 1692k(a)(3) limits an award of costs under the FDCPA to cases in which the court makes a finding "that an action under this section was brought in bad faith and for the purpose of harassment," *see* Pet. App. 7a, it later stated that § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of

course." *Id.* at 8a; *see also id.* at 18a ("Only [an award of attorney's fees] is linked to a finding that the action has been brought by the plaintiff in bad faith."). The court held that an award of costs under Rule 54(d) was thus proper.

This holding conflicts with an FDCPA decision by the Ninth Circuit and with a decision of the Seventh Circuit considering an analogous statute. The Ninth Circuit, in *Rouse v. Law Offices of Rory Clark*, considered the relationship between § 1692k(a)(3) of the FDCPA and Rule 54(d), and a unanimous panel agreed that the FDCPA limits a court's authority to award costs to a prevailing defendant. Looking to rules of grammar, legislative history, and the purpose of the FDCPA, the court held that costs may not be awarded to a prevailing defendant in an FDCPA case "without a finding that plaintiff brought the action in bad faith and for the purpose of harassment." 603 F.3d at 706. *See also Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989) (stating in dicta that "section 1692k(a)(3) permits a court to award reasonable attorney's fees and costs only upon a finding 'that an action under this section was brought in bad faith and for the purpose of harassment.'"). The Tenth Circuit expressly stated its disagreement with *Rouse*. Pet. App. 12a, 18a.[2]

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[2]The Tenth Circuit wrongly suggested that *Rouse* is inconsistent with a prior Ninth Circuit decision, *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010). Pet. App. 12a. *Quan* held that ERISA—providing that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"—does not "plainly 'provide otherwise' than Rule 54(d)(1) for the award of costs to a prevailing party." 623 F.3d at 888. Because both the ERISA provision and Rule 54(d)(1) allow but do not require district courts to award costs, *Quan* is correct and not in tension with *Rouse*. And contrary to the Tenth Circuit's charac-

(continued...)

The decision below also conflicts with a Seventh Circuit case concerning 46 U.S.C. § 2114, which protects seamen against discrimination. Subsection 2114(b) provides that, in an action brought by a seaman under subsection 2114(a), the court may award "costs and reasonable attorney's fees to a prevailing employer not exceeding $1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith." In *Gwin v. American Rover Transportation Co.*, 482 F.3d 969, 974 (7th Cir. 2007), a prevailing employer argued that this language augmented the normal recovery of costs to a prevailing defendant with an award of attorney's fees, not recoverable under Rule 54(d), but did not affect eligibility for an award of costs under Rule 54(d)—essentially the same argument accepted by the Tenth Circuit here. Rejecting that argument, the Seventh Circuit stated that "[i]f the statute was merely supplementing Rule 54(d) by allowing attorney's fees, then it would not have included an express reference to costs." 482 F.3d at 974. The court thus held that the statute limited an award of costs to prevailing defendants to cases in which the lawsuit was frivolous or brought in bad faith.[3]

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[2](...continued)
terization, *Quan*'s statement that "[t]o 'provide otherwise' than Rule 54(d)(1), the statute or rule would have to bar an award of costs to the prevailing party," *id.*, does not "adhere[] to a different logic" than *Rouse*, Pet. App. 12a, because *Rouse* holds that § 1692k(a)(3) does bar an award of costs to a prevailing party in some circumstances where Rule 54(d) would permit an award.

[3]In addition to creating an appellate-court conflict, the decision below runs contrary to the great majority of district court decisions applying § 1692k(a)(3). *See, e.g.*, *Clark v. Brumbaugh & Quandahl, PC*, 731 F. Supp. 2d 915, 925-26 (D. Neb. 2010) (continued...)

The court's holding not only created a conflict among the federal courts of appeals; it is also incorrect. Under the court's reading, the words "and costs" are "mere surplusage," Pet. App. 24a (Lucero, J., dissenting), as they serve no function but to restate Rule 54(d). And if the sentence's introductory clause does not modify "and costs," those two words become untethered to the rest of the sentence and, grammatically, entirely inexplicable. Because § 1692k(a)(3) can be read otherwise, to give meaning and purpose to every word, the court below erred in reading "and costs" out of the sentence. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' " (citation omitted)).

The FDCPA is "primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance." S. Rep. No. 95-382, at 5. Yet

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[3](...continued)
("[Defendant] has made no explicit argument that Clark initiated this suit in bad faith or for the purpose of harassment. Accordingly, the Court will not make such a finding, and will sustain Clark's objection to [defendant's] bill of costs."); *Bacelli v. MFP, Inc.*, 2010 WL 4054107, *1 (M.D. Fla. 2010) ("As the Court has already determined that a finding of bad faith is not warranted here, costs are not available to Defendant MFP." (record citation omitted)); *Pavone v. Citicorp Credit Servs.*, 60 F. Supp. 2d 1040, 1049 (S.D. Cal. 2007) ("Here, the Court finds no indication that [plainitff] has acted in bad faith or for the purpose of harassment in bringing this action. Accordingly, [defendant] is not entitled to its costs or attorneys' fees under either Rule 54(d) or the FDCPA."); *Wilson v. Transworld Sys.*, 2003 WL 21488206, at *1 (M.D. Fla. 2003); *Csugi v. Monterey Fin.* Servs., 2001 WL 1841444, *1 (D. Conn. 2001); *Latimer v. Transworld Sys.*, 842 F. Supp. 274, 275 (E.D. Mich. 1993); *but see Thomasson v. GC Servs. Ltd. P'ship*, 2007 WL 3203037, at *2-*3 (S.D. Cal. 2007) (overruled by *Rouse*).

FDCPA plaintiffs are, by and large, people in debt who might be deterred from challenging abusive and deceptive collection practices by the possibility of being held liable for the defendants' costs in non-frivolous cases. Section 1693k(a)(3) minimizes that deterrent, while "protect[ing] debt collectors from nuisance lawsuits, if the court finds that an action was brought by the consumer in bad faith and for harassment," by allowing for an award of fees and costs to the debt collector in that circumstance. S. Rep. No. 95-382, at 5. The Tenth Circuit's holding is thus inconsistent with the purpose and background of the FDCPA, as well as its text. *See Rouse*, 603 F.3d at 705 (§ 1693k(a)'s limitation on award of costs to defendants is "consistent with the stated intent of Congress").

This Court should grant the petition to resolve the conflict among the circuit courts and confirm a reading of § 1692k(a) that is consistent with its plain meaning and the purpose of the FDCPA.

II. The Decision Below With Respect To The Scope Of "Communications" Runs Counter To The Accepted Understanding Of The FDCPA And Eliminates Critical Protections Of The Act.

The scope of the term "communication" under the FDCPA is critical to the functioning of the statute, which protects consumers from "abusive, deceptive, and unfair debt collection practices," 15 U.S.C. § 1692(a), by, among other things, restricting debt collectors' communications with third parties. Because many of the prohibitions in the statute relate to "communications," the question whether an action is a communication arises often in cases brought by consumers under the FDCPA.

Below, the Tenth Circuit held that whether the fax was a "communicat[ion] in connection with the collection of any

debt" turns on whether it "indicate[s] to the recipient that the message relates to the collection of a debt." Pet. App. 4a. Thus, the undisputed facts that GRC's fax was "in connection with the collection of any debt," said "Sallie Mae" at the top, and included Ms. Marx's account number were of no moment, absent evidence that the fax "indicated" that there was a debt. As Judge Lucero explained in his dissent, the Tenth Circuit's decision "engrafts an additional element onto [the statutory] definition" by holding that a "communication" under the FDCPA "must convey information regarding a debt *and* indicate to the recipient of the correspondence that the message relates to the collection of a debt." Pet. App. 21a.

The decision below renders important provisions of the FDCPA inoperative, undermining the substantive protections of the Act. For instance, § 1692b creates an exception to § 1692c(b)'s general prohibition against "communicat[ing]" with third parties in connection with a consumer's debt by allowing a debt collector to "communicat[e]" with a third party "for the purpose of acquiring location information about the consumer." In so communicating, however, the debt collector "shall . . . not state that [the] consumer owes any debt" (§ 1692b(2)) and "not use any language or symbol" on any written communication that "indicates . . . that the communication relates to the collection of a debt" (§ 1692b(5)). *See supra* pp. 3-4 (quoting § 1692b in full). Under the Tenth Circuit's reading, the narrow location-information exception to the general rule against "communicat[ing]" with third parties would be meaningless because the general rule would allow a broader range of contacts than the exception.

For example, the Tenth Circuit would permit telephone calls, letters, faxes, postcards, or emails by a debt collector to an employer, neighbor, or other third party, making a

broad range of intrusive inquiries about the consumer—not only inquiries regarding location information—as long as the debt collector does not indicate that its call, letter, or fax relates to a debt. Such inquiries, in the Tenth Circuit's view, are not "communications" and thus not prohibited by § 1692c(b). Indeed, under the Tenth Circuit's reading, § 1692b(5) is nonsense, because if a "communication" by definition must "indicate" to the third party that it regards a debt (Pet. App. 4a), it cannot at the same time *not* "indicate" that it relates to a debt. The CFPB made this same point as amicus curiae in support of the petition for rehearing below.[4]

Similarly, § 1692d(6) prohibits any call to a third party (or a consumer) without "meaningful disclosure" of the caller's identity, "[e]xcept as provided in section 1692b"—that is, unless the debt collector is communicating with a third party for the purpose of acquiring location

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[4]The CFPB explained that "the majority's interpretation would render several other of § 1692b's risks-minimizing restrictions nugatory." CFPB Tenth Cir. Br. 8, *available at* 2011 WL 7144818. Under the Tenth Circuit's interpretation,

> if a debt collector complies with § 1692b's content restriction—most notably § 1692b(5)'s bar on indicat[ing] . . . that the communication relates to the collection of a debt"—it is not "communicating" and thus need not comply with the rest of § 1692b. This effectively nullifies § 1692b's other restrictions. Under the majority's interpretation, therefore, debt collectors seeking location information will be able to send postcards, contact third parties more than once, and contact third parties when they could contact the consumer's attorney instead—all in contravention of any reasonable understanding of § 1692b.

CFPB Tenth Cir. Br. 8-9.

information. "Meaningful disclosure" includes the disclosure that the caller is a debt collector.[5] Yet the Tenth Circuit effectively held that, without a meaningful disclosure, a debt collector is not "communicating" at all. That holding creates a paradox: the statute forbids conduct (calls without meaningful disclosure, except communications with third parties to acquire location information) that, according to the Tenth Circuit, it expressly allows (calls to third parties, not limited to calls seeking location information, as long as there is no meaningful disclosure).

In addition, the FDCPA prohibits "communicating or threatening to communicate to any person" false credit information. 15 U.S.C. § 1692e(8). Under the Tenth Circuit's reading, a debt collector would not violate this provision if it gave someone false credit information, as long as it did so without indicating that the consumer owed a debt.

The FDCPA also prohibits the use of a written "communication" that "is falsely represented to be a document authorized, issued, or approved by a court, official, or [government] agency." *Id.* § 1692e(9). Again, under the Tenth Circuit's reading, a debt collector would not violate this provision if it sent a document with such a false representation to a consumer or third-party in an effort to collect a debt, as long as the document did not mention a debt.

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[5] *See, e.g., Sparks v. Philips & Cohen Assocs.*, 641 F. Supp. 2d 1234, 1247 (S.D. Ala. 2008); *Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1075 (E.D. Cal. 2007); *Masciarelli v. Richard J. Boudreau & Assocs., LLC*, 529 F. Supp. 2d 183, 185 (D. Mass. 2007); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005).

As one district court, rejecting the precise argument adopted below, explained: "[A] narrow reading of the term 'communication' to exclude instances . . . where no specific information about a debt is explicitly conveyed could create a significant loophole in the FDCPA, allowing debtors to circumvent the § 1692e(11) disclosure requirement, and other provisions of the FDCPA that have a threshold 'communication' requirement, merely by not conveying specific information about the debt." *Foti v. NCO Fin. Sys.*, 424 F. Supp. 2d 643, 657 (S.D.N.Y. 2006). "Such a reading is inconsistent with Congress's intent to protect consumers from 'serious and widespread' debt collection abuses." *Id.* at 657-58. *See also Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 1189 (W.D. Wash. 2011) ("Affirming the narrow interpretation [of 'communication'] would provide a loophole for debt collectors and allow them to tailor their voicemail messages in order to circumvent the disclosure requirement under section 1692e(11).").

The Tenth Circuit's view also contradicts the view of the federal banking regulators, including the CFPB, the Office of the Comptroller of the Currency, and the Federal Reserve Board. Each of these agencies has advised that the FDCPA generally prohibits communications with a third party concerning a debt, regardless of whether the debt collector actually indicates to the third party the reason for the communication (that is, because the debt collector is pursuing a debt). *See* CFPB, *Supervision and Examination Manual*, *supra* page 6, at FDCPA 2-3 (stating that debt collector may not "contact" third parties except to request location information when debt collector is unable to locate the consumer); OCC, *Other Consumer Protection Laws and Regulations*, *supra* page 6, at 24 (same); Federal Reserve Board, *Consumer Compliance Handbook*, *supra* page 6, at FDCPA 2 (same).

The decision below also runs counter to decisions of more than twenty district courts spread throughout fifteen federal judicial districts. The overwhelming majority of courts to consider whether a particular activity (usually, a telephone call) violated § 1692c(b)'s prohibition on "communicat[ing]" with a third party "in connection with the collection of any debt" have read the provision to state an objective test that looks to the content of the information sent to determine whether it "convey[ed] information regarding a debt directly or indirectly," § 1692a(2), not to whether that information indicates to the recipient that it relates to a debt. *See Lensch*, 795 F. Supp. 2d at 1188-89; *Yarbrough v. FMS, Inc.*, 2010 WL 4826247, at *2 (S.D. Fla. 2010); *Shand-Pistilli v. Prof'l Account Servs.*, 2010 WL 2978029, *3-*4 (E.D. Pa. 2010); *Hutton v. C.B. Accounts, Inc.*, 2010 WL 3021904, at *2-3 (C.D. Ill. 2010); *Krug v. Focus Receivables Mgmt., LLC*, 2010 WL 1875533, at *1-3 (D.N.J. 2010); *Nicholas v. CMRE Fin. Servs.*, 2010 WL 1049935 at *3-5 (D.N.J. 2010); *Inman v. NCO Fin. Sys.*, 2009 WL 3415281, at *3-4 (E.D. Pa. 2009); *Mark v. J.C. Christensen & Assocs.*, 2009 WL 2407700, at *2-3 (D. Minn. 2009); *Savage v. NIC, Inc.*, 2009 WL 2259726, at *1, *5 (D. Ariz. 2009); *Wideman v. Monterey Fin. Servs.*, 2009 WL 1292830, at *2 (W.D. Pa. 2009); *Edwards v. Niagra Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008); *Berg v. Merchants Ass'n Collection Div'n, Inc.*, 586 F. Supp. 2d 1336, 1340-41 (S.D. Fla. 2008); *Thomas v. Consumer Adjustment Co.*, 579 F. Supp. 2d 1290, 1296-97 (E.D. Mo. 2008); *Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d 1035, 1041-42 (N.D. Ill. 2008); *Costa*, 634 F. Supp. 2d at 1075-76; *Foti*, 424 F. Supp. 2d at 654-59; *Leyse v. Corporate Collection Servs.*, 2006 WL 2708451, at *6 (S.D.N.Y. 2006); *Belin v. Litton Loan Serv., LP*, 2006 WL 1992410, at *4-5 (M.D. Fla. 2006); *Hosseinzadeh*, 387 F. Supp. 2d at 1116; *Henderson v.*

Eaton, 2001 WL 969105, at *2-3 (E.D. La. 2001); *West v. Nationwide Credit, Inc.*, 998 F. Supp. 642, 644-45 (W.D.N.C. 1998).

While these cases recognize that a communication, such as "a phone call by a debt collector that in no way regards, or relates to an outstanding debt would not violate the Act," *Foti*, 424 F. Supp. 2d at 429, the cases overwhelmingly reject a narrow interpretation of "communication" that requires that specific information that there is a debt be conveyed or understood. For instance, in the widely-cited case *West v. Nationwide Credit*, the court held that a debt collector had "communicated" with a third-party within the meaning of the FDCPA by calling the plaintiff's neighbor to ask the neighbor to ask the plaintiff to return the call to discuss a "very important" matter, although the debt collector did not tell the neighbor that the matter concerned a debt. *See* 998 F. Supp. at 644. The court explained that, if it "were to adopt Defendant's interpretation of section 1692c(b) and construe the provision as only prohibiting third party communications in which some information about a debt is actually disclosed, section 1692b would be superfluous." *Id.* at 645. And "[u]nder Defendants' narrow interpretation, debt collectors would be free under section 1692c(b) to . . . communicate with third parties so long as the debt collectors do not reveal any information about a debt. If Congress had intended for the statute to be interpreted in this manner, it would not have drafted section 1692b." *Id.* Likewise, *Krug* explicitly rejected a debt collector's argument that the court needed "context" before it could determine whether voicemail messages referring to a

"personal business matter" were "communications" under the FDCPA. *See* 2010 WL 1875533, at *1, *3.[6]

In sum, the term "communication" is central to the functioning of the FDCPA, and the Tenth Circuit's decision limiting the scope of that term is inconsistent with the language and structure of the Act as a whole, as well as the views of an overwhelming majority of courts and federal regulators. This Court should grant the petition to cure the distortion of the statute and the likelihood of confusion among the lower courts created by the Tenth

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[6] In *Horkey v. J.D.B. Associates*, the debt collector called the consumer at work and, when a co-worker answered, told the co-worker to tell the consumer "to stop being such a [expletive]." The district court held that the call was not a third-party communication in violation of § 1692c(b) because the conversation "was merely limited to inquiring as to Plaintiff's whereabouts," 179 F. Supp. 2d 861, 868 (N.D. Ill. 2002), but that the call violated the FDCPA's prohibition against abusive conduct.

A handful of unpublished district court cases hold that a voicemail message containing only a name and a request for a return call from someone whom the debtor does not know is a debt collector are not "communications" that trigger the FDCPA's protections against anonymous communciations. *See Makreas v. Moore Law Group, A.P.C.*, 2011 WL 4803005, at *3 (N.D. Cal. 2011); *Koby v. ARS Nat'l Servs.*, 2010 WL 1438763, at *4 (S.D. Cal. 2010); *Biggs v. Credit Collections, Inc.*, 2007 WL 4034997, at *4 (W.D. Okla. 2007); *see also Fava v. RRI, Inc.*, 1997 WL 205336, at *6 (N.D.N.Y. 1997) (fax to debtor's father that had no information about debt was not a "communication"). Each of these cases addresses alleged violations of § 1692e(11), which requires a debt collector to identify himself as such in communications with the consumer as a means of preventing "false and misleading representations." The majority of courts, however, have held such messages to be indirect communications that trigger the protections of the Act. *See, e.g., Lensch*, 795 F. Supp. 2d at 1188-89 (discussing cases).

Circuit's decision about the meaning of the term "communication" in § 1692a(2) and the scope of the prohibition on third-party communications contained in § 1692c(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

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APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OLIVEA MARX,

Plaintiff – Appellant,

v.

GENERAL REVENUE CORPORATION, an Ohio Corporation,

Defendant – Appellee,

KEVIN COBB,

Defendant.

No. 10-1363

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 1:08-CV-02243-RPM-CBS)

David M. Larson, Colorado Springs, Colorado, for Plaintiff – Appellant.

Steven Wienczkowski (and Adam L. Plotkin of Adam L. Plotkin, P.C., with him on the brief), Denver, Colorado, for Defendant – Appellee.

Before **KELLY**, **LUCERO**, and **GILMAN***, Circuit Judges.

KELLY, Circuit Judge.

Plaintiff-Appellant Olivea Marx appeals from the district court's judgment in favor of Defendant-Appellee General Revenue Corporation ("GRC"). After a bench trial, the district court found no violation of the Fair Debt Collection Practices Act ("FDCPA") and awarded costs to GRC in the amount of $4,543. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Background

Ms. Marx defaulted on her student loan. In September 2008, her guarantor, EdFund, a division of the California Student Aid Commission, hired GRC to collect on the account. In October 2008, Ms. Marx sued GRC, alleging abusive and threatening phone calls in violation of the FDCPA. Aplt. App. 11-16. GRC then made an offer of judgment, which Ms. Marx did not accept. Aplt. App. 1174-116. She amended her complaint in March 2009 to add a claim that GRC violated the FDCPA by sending a facsimile to her workplace that requested information about her employment status. Aplt. App. 23-31. The dis-

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* The Honorable Ronald Lee Gilman, United States Circuit Court Judge, Sixth Circuit, sitting by designation.

trict court, after a one-day trial in May 2010, found that the challenged collection practices were not abusive and threatening given its view of what actually occurred. Aplt. App. 352-357. She does not appeal these findings. Instead, she contests the court's conclusion that the facsimile did not violate the FDCPA's provision against debt-collector communications with third parties.

The facsimile was sent in September 2008 to Ms. Marx's employer as part of GRC's inquiry into Marx's eligibility for wage garnishment. When a GRC agent called Ms. Marx's employer to verify her employment status, the agent was told to make the request in writing. Aplt. App. 217-18. GRC sent its standard employment verification form. This form displays GRC's name, logo, address, and phone number, and bears an "ID" number representing GRC's internal account number for Ms. Marx. The form indicates that its purpose is to "verify [e]mployment" and to "[request] employment information"; blanks are left for the employer to fill in the individual's employment status, date of hire, corporate payroll address, and position, and to note whether the individual works full- or part-time. Aplt. App. 113.

On appeal, Ms. Marx argues that GRC violated the FDCPA by sending the facsimile and claims that the district court erred in: (1) finding that a facsimile sent by GRC did not constitute a "communication" under the FDCPA; (2) awarding GRC costs pursuant to Fed. R. Civ. P. 54(d); and (3) permitting (in the alternative) an award of costs following GRC's offer of judgment pursuant to Fed. R. Civ. P. 68.

Discussion

A. Whether the Facsimile Constitutes a "Communication"

Our review of the district court's factual findings is for clear error; legal conclusions are reviewed de novo. *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir. 2001). We view the record in its entirety in the light most favorable to the district court's findings, accepting those findings, if plausible, even though we might have weighed the evidence differently. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985).

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The law provides, among other things, that a "debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer." 15 U.S.C. § 1692c(b). A "communication" is defined as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

The facsimile in question is not a "communication" under the FDCPA. A third-party "communication," to be such, must indicate to the recipient that the message relates to the collection of a debt; this is simply built into the statutory definition of "communication." This fax cannot be construed as "conveying" information "regarding a debt." Nowhere does it expressly reference debt; it speaks only of "verify[ing] [e]mployment." Nor could it reasonably be construed to imply a debt. In order to substantiate the claim that the facsimile "conveys" information "regarding a debt," either "directly or indirect-

ly," Ms. Marx had the burden of proving such a conveyance; the standard is not whether the facsimile *could have had* such an implication. No testimony shows that Ms. Marx suffered any actual harm (such as embarrassment or a denial of promotion) or that her employer was aware that the facsimile in any way concerned a default on a student loan. Aplt. App. 180-185; 199-200. Ms. Marx did not call any witnesses from her employer's office to testify as to what they inferred from the facsimile. Aplt. App. 355.

Instead, she argues that the existence of a debt was implied by the ID or account number that appeared on the facsimile; this, she claims, makes it a "communication." Aplt. Br. at 4-5. GRC, however, designed the form precisely to avoid such an implication. When asked at trial why the faxed form contained an ID number, the agent who sent it testified: "One of the first things we're taught in training is you can never imply debt to a third party. ID could be a—just an identification number to an application, or whatever. We don't ever say account when we're speaking with an authorized third party." Aplt. App. 221. GRC conceded at oral argument that if its corporate name had somehow disclosed the nature of its business, the case would different. But absent any evidentiary showing that Ms. Marx's employer either knew or inferred that the facsimile involved a debt, the facsimile does not satisfy the statutory definition of a "communication." A party may seek to verify employment status (without hinting at a debt) for any number of reasons, including as part of processing a mortgage, conducting a background check before hiring, or determining eligibility for an extension of credit.

Because we find that the facsimile did not constitute a "communication" within the ambit of the FDCPA, we need not consider whether GRC violated § 1692c(b)'s

prohibition against debt-collector "communicat[ions]" with third parties.

B. Costs

The district court awarded costs pursuant to Federal Rules of Civil Procedure 54(d)(1) and 68(d). We review an award of costs for an abuse of discretion. *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004). Whether costs provisions even apply is a legal question reviewed de novo. *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1276 (10th Cir. 2011).

1. Costs under Rule 54(d)

Rule 54(d)(1) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). The FDCPA also contains a costs provision:

> [I]n the case of any successful action to enforce the foregoing liability, [the defendant is liable for] the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs. 15 U.S.C. § 1692k(a)(3).

Ms. Marx argues that the "plain language of the FDCPA is clear" that "costs may only be awarded to a Defendant upon a finding that the Plaintiff brought the case in bad faith and for the purpose of harassment." Aplt. Br. at 10. We are told this is so because (1) a statute of specific effect should supersede a general one, Aplt. Br. at 10; (2) the FDCPA costs provision postdates Rule 54, Aplt. Br. at 10; and (3) the FDCPA is a "remedial" statute that ought to be construed liberally in favor

of the plaintiff, a conclusion allegedly supported by passages in the Act's legislative history, Aplt. Br. at 11.

We disagree. After careful review, we hold that § 1692k(a)(3), properly construed, unambiguously provides for two cost-shifting scenarios: one for a prevailing plaintiff and the other for a prevailing defendant. When a plaintiff prevails, he or she recovers costs and reasonable attorney's fees. *Anchondo v. Anderson, Crenshaw & Assocs.*, 616 F.3d 1098, 1107 (10th Cir. 2010). When a defendant prevails *and* the court finds that the suit was brought in bad faith and for the purpose of harassment, then (in the court's discretion) that defendant may *also* recover attorney's fees. *Smith v. Argent Mortg. Co.*, 331 F. App'x. 549, 559 (10th Cir. 2009). This much is undisputed. The issue here is whether a prevailing defendant can be awarded costs in a FDCPA suit without a finding that the plaintiff brought the action in bad faith and for the purpose of harassment. This requires us to consider whether § 1692k(a)(3) supersedes Rule 54(d). We hold that it does not, and that this Defendant is entitled to a recovery of costs pursuant to Rule 54(d).

In "ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). We read the bad-faith-and-harassment provision of § 1692k(a)(3) to indicate two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) "attorney's fees reasonable in relation to the work expended" and (2) "costs." Attorney's fees and costs are legally distinct categories of monetary allowances made to successful litigants (with different standards, as we discuss below). We are disinclined, therefore, to read the word "costs" as being subject to "reasonable in relation

to." In other words, we do not read the provision as allowing attorney's fees so long as they are reasonable *in relation to* the costs incurred by the party, the construction largely argued for by GRC.

Congress has full power to statutorily supersede any or all of the Rules, but "unless the congressional intent to do so clearly appears, subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible." *U.S. v. Gustin-Bacon Div., Certainteed Prods. Corp.*, 426 F.2d 539, 542 (10th Cir. 1970). Our interpretation ensures that § 1692k(a)(3) accords with the Rule 54(d) award for costs to a prevailing party. The successful-plaintiff provision also provides for the "costs" of the action, in addition to reasonable attorney's fees. But if Rule 54(d) already gives the prevailing party his costs, why bother mentioning it here? We believe § 1692k(a)(3)—in both its prevailing-plaintiff and bad-faith provisions—merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of course. Nothing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits.

The presumption that a prevailing party is entitled to costs is, in our legal system, a venerable one. "Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized...." *Buckhannon Bd. & Care Home, Inc., v. W.V. Dep't. of Health & Human Res.*, 532 U.S. 598, 611 (2001) (quoting *The Baltimore*, 8 Wall. 377, 388 (1869)) (Scalia, J., concurring). A clear showing of legislative intent is needed before we find that Rule 54(d) is displaced by a statute.

Attorney's fees, by contrast, under the American Rule, are paid by each party. Congress has legislated exceptions for prevailing plaintiffs in actions to enforce federal rights. *See, e.g.*, Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988(b) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"); Fair Labor Standards Act, 29 U.S.C. § 216(b) (the "court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action"); Copyright Act, 17 U.S.C. § 505 ("the court may also award a reasonable attorney's fee to the prevailing party as part of the costs"); Presidential and Executive Office Accountability Act, 28 U.S.C. § 3905(a) (to "a prevailing party...the court may award attorney's fees, expert fees, and any other costs").

Other statutes (following the common law) make an exception to the American Rule for suits brought in bad faith or for purposes of vexation or harassment, or suits known to be meritless. *See, e.g.*, 28 U.S.C. § 1875(d)(2) (awarding "reasonable attorney's fees as part of the costs" to employers who successfully defend against suits that are "frivolous, vexatious, or brought in bad faith" by employees claiming to have been punished for jury service); 15 U.S.C. § 1693m(f) (awarding attorney's fees to defendants prevailing over suits "brought in bad faith or for purposes of harassment" in suits over electronic fund transfers); 42 U.S.C. § 11113 (awarding attorney's fee to physician-defendants who defeat claims under "professional review" law that are "frivolous, unreasonable, without foundation, or in bad faith"). But that a plaintiff's bad faith should obligate him to pay his opponent's attorney's fees hardly suggests that his good faith should relieve him of paying his opponent's *costs*.

As observed in *Pacheco v. Mineta*, 448 F.3d 783, 794 (5th Cir. 2006):

> Every circuit to expressly address the question in a published opinion—the Fourth, Sixth, Seventh, Ninth and Tenth—has ruled that good faith, by itself, cannot defeat the operation of Rule 54(d)(1). *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994) ("[T]he mere fact that a suit may have been brought in good faith is alone insufficient to warrant a denial of costs in favor of a prevailing defendant"); *Cherry v. Champion*, 186 F.3d 442, 446 (4th Cir. 1999) ("[A] party's good faith, standing alone, is an insufficient basis for refusing to assess costs against that party."); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986) ("Good faith without more, however, is an insufficient basis for denying costs to a prevailing party"); *Coyne-Delany v. Capital Development Board of Illinois*, 717 F.2d 385, 390 (7th Cir. 1983) ("The losing party's good faith and proper conduct of the litigation is not enough...."); *National Information Services, Inc. v. TRW, Inc.*, 51 F.3d 1470, 1472-73 (9th Cir. 1995), *overruled on other grounds by Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 593 (9th Cir.2000) (en banc) (overruling *National Information Systems* but only to the extent it held that "*only* misconduct may support the denial of costs to a prevailing party"); *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1527 (10th Cir.1997).

The only way to relieve Ms. Marx of GRC's entitlement to costs is a legal conclusion that the FDCPA prevents the application of Rule 54(d) in this case.

The legislative history on that point, cited by Ms. Marx, is neutral at best. "When there is a conflict be-

tween portions of legislative history and the words of a statute, the words of the statute represent the constitutionally approved method of communication, and it would require 'unequivocal evidence' of legislative purpose as reflected in the legislative history to override the ordinary meaning of the statute." *Miller v. C.I.R.*, 836 F.2d 1274, 1283 (10th Cir. 1988). The FDCPA's Senate Report, in discussing the civil liability provisions, explains that "[i]n order to protect debt collectors from nuisance lawsuits, if the court finds that an action was brought by a consumer in bad faith and for harassment, the court may award the debt collector reasonable attorney's fees and costs." S. Rep. No. 95-382, at 5 (1977), *as reprinted* in 1977 U.S.C.C.A.N. 1695, 1700. According to Ms. Marx, this indicates Congress's intent to award costs only upon a showing of bad faith. Yet in the subsequent "summary" of its provisions, the Report says: "Where a court finds that a suit was brought by a consumer in bad faith and for harassment, the court may award reasonable attorney's fees to the defendant." *Id.* at 8; 1977 U.S.C.C.A.N. at 1702. Putting these passages together, the legislative history could suggest that the FDCPA's costs provision is the exclusive grantor of costs in FDCPA suits—or it could suggest nothing of the sort. In any event, our holding is that irrespective of the mention of "costs" in § 1692k(a)(3), costs can still be awarded under Rule 54(d). The Report nowhere indicates that the FDCPA's cost provision was intended to displace this long-standing rule of civil procedure. The fact that the FDCPA postdates Rule 54, or that the FDCPA should be construed "liberally," does not change this result.

"[A] statute which adopts an expression which has received a long and consistent judicial interpretation in similar contexts is not a likely candidate for ambiguity." *Miller*, 836 F.2d at 1283. Laws under the same title of

the U.S. Code employ variants of the language in this provision. *See, e.g.*, 15 U.S.C. § 1693m(f) ("On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."); 15 U.S.C. § 15c(d)(2) ("the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons"); 15 U.S.C. § 78u(h)(8) ("the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate judge finds that the customer's claims were made in bad faith"); 15 U.S.C. § 4304(a)(1) (the court shall "award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee"). Some provisions mention "costs"; some do not; some mention attorney's fees as part of the costs. But with one exception, no circuit has found that any of these provisions displaced Rule 54(d).

The exception is *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010), heavily relied upon by Ms. Marx. The Ninth Circuit held that a "prevailing defendant cannot be awarded costs under the FDCPA unless the plaintiff brought the action in bad faith and for the purpose of harassment." *Id.* at 701. For the reasons explained above, we do not find the holding that Rule 54(d) is superseded by the FDCPA's §1692k(a)(3) persuasive.

We might point out that the Ninth Circuit itself adhered to a different logic in *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010), where it considered the question of whether Rule 54(d)(1) was "supplanted" by 29 U.S.C. § 1132(g)(1), ERISA's costs-and-attorney's-fees provision ("the court in its discretion may allow a

reasonable attorney's fee and costs of action to either party"). That court held that "§ 1132(g)(1) does not plainly 'provide otherwise' than Rule 54(d)(1) for the award of costs to a prevailing party. To 'provide otherwise' than Rule 54(d)(1), the statute or rule would have to bar an award of costs to a prevailing party. Section 1132(g)(1), however, in no way precludes an award of costs to a prevailing party...." *Id.* at 888.

The *Rouse* court observed that the FDCPA is part of the larger statutory scheme of the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. §§ 1601-1693r. The court compared the FDCPA cost provision to analogues under the CCPA, in particular the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x, which provides, in § 1681n(c) and § 1681o(b), that upon a court's finding "that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper." The court explained that, among the CCPA statutes, "only the FDCPA and the FCRA provide for prevailing defendants," and concluded that since the FDCPA uses the word "costs" and the FCRA does not, Congress must have meant to "condition" an award of costs to a prevailing FDCPA defendant on a showing of "bad faith." *Rouse*, 603 F.3d at 706.

But in fact there is another CCPA law that delivers costs to prevailing defendants. The Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r, provides, in § 1693m(f): "On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work

expended and costs." The language here as to attorney's fees and costs is identical to that of the FDCPA. We do not find the Ninth Circuit's reliance on the distinction it drew to be persuasive.

Finally, an award of attorney's fees upon a finding that a suit was brought in bad faith and for the purpose of harassment is obviously intended to penalize a party that brings such a suit; it stands to reason that a finding of bad faith should be required by the FDCPA before an award of attorney's fees is made. An award of costs under Rule 54(d), however, is "presumptive." *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1204 (10th. Cir. 2000). Parties are well aware of this and it is common for parties settling a case to insert the phrase "each party to bear its own costs." Without such agreement, however, to deny a prevailing party its costs is "in the nature of a severe penalty," such that there "must be some apparent reason to penalize the prevailing party if costs are to be denied." *Klein v. Grynberg*, 44 F.3d 1497, 1507 (10th Cir. 1995). Absent some clear and specific statutory command, it does not seem proper to hold that a party should be penalized for proving that it committed no violation of law.

In sum, Rule 54(d) requires that courts award costs to the prevailing party unless a federal statute provides otherwise. We find that there is nothing in the language of §1692k(a)(3) that should prevent Rule 54(d)'s normal operation.

2. Costs under Rule 68(d)

The district court concluded that costs were awardable pursuant to Rule 68(d). Under this rule, if a defendant makes a formal offer of settlement, and the plaintiff rejects it but later obtains a judgment less favorable than the one offered him or her, the plaintiff-offeree "must pay the costs incurred after the offer was made."

Fed. R. Civ. P. 68(d). In November 2008, three weeks after Ms. Marx's complaint was filed, GRC made an offer of judgment of $1,500 plus Ms. Marx's costs and attorney's fees on claims where fee shifting was available. Aplt. App. 114. The offer was not accepted and lapsed by its own terms.

We agree with Ms. Marx (but for reasons different than those argued) that the court erred in awarding the prevailing defendant its costs under this rule. Rule 68 applies only where the district court enters judgment in favor of a plaintiff for an amount less than the defendant's settlement offer. *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1281 (10th Cir. 2011); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (Rule 68 "applies only to offers made by the defendant and only to judgments obtained by the plaintiff" and is "simply inapplicable" when the defendant obtains the judgment). Nonetheless, since GRC's costs were properly awarded pursuant to Rule 54(d), the error is harmless.

C. The Dissent

The dissent claims that we "engraft" an additional element onto the definition of "communication" when we require that the recipient of the alleged "communication" know or be able to infer that a debt is concerned. But we think such a requirement is implicit in the word "convey." To convey is to impart, to make known. If one drafts a letter full of unlawful collection threats, but never mails it, nothing is conveyed. So, too, if the "communication" is in Sanskrit. The fax here never used the words "debt," "collector," "money," "obligation," or "payment." The dissent instead relies on the account number, but what does this convey? It is a jumble of numbers, designed for internal identification purposes, the functional equivalent of a bar code. By contrast, if the employer knew the collection agency from experience, a communi-

cation could occur. Or, as in *Austin v. Great Lakes Collection Bureau*, 834 F.Supp. 557 (D. Conn. 1993), a plaintiff could prove a "communication" with testimony from an office secretary stating that it was "clear from the questions she asked that [the collector] was calling about a debt or judgment." *Id.* at 558.

The substance of the supposed infraction here is manifestly not the sort of conduct the FDCPA is meant to quell. The district court and magistrate cases cited by the dissent exemplify this as well as any. In one, a collector called twenty-one times in the seven days. *Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d. 1038 (N.D. Ill. 2008). In another, an agent impersonated the debtor's brother to secure a return call. *Thomas v. Consumer Adjustment Co., Inc.*, 579 F. Supp. 2d. 1290, 1292 (E.D. Mo. 2008). In four of the six cases the defendant never disputed that it made a "communication." Here, however, we have a single fax, innocuous, nondescript, and harmless, which GRC sent only to gather information needed to weigh a statutory right of garnishment. The ban on communicating with third parties like employers is meant to protect debtors from harassment, embarrassment, loss of job, denial of promotion. Ms. Marx, by contrast, was unable to testify that anyone at her office had any idea what the fax concerned. GRC took pains to ensure this result. Moreover, every one of the dissent's cases is a ruling on a 12(b)(6) or summary judgment motion, which means that those courts lacked precisely what we have: a trial at which the plaintiff conceded on the stand that she has no evidence that her employer suspected that the fax concerned a debt.

The dissent also argues that our reading of the term "communication" renders § 1692b(5) "superfluous." Apparently this is so because § 1692b(5) prohibits "communication" that "relates to the collection of debt" and yet

we hold above that "communication" by definition *always* concerns conveying information about debt. But we only heed the statute's own definition of "communication," in § 1692a(2):

> The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

It may seem redundant, but if canons of construction are to be invoked, the appropriate one is that of *ex abundanti cautela* (abudance of caution), which teaches that Congress may on occasion repeat language in order to emphasize it. *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990).

"The canon requiring a court to give effect to each word '*if possible*'" is not absolute; it "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if inadvertently inserted or if repugnant to the rest of the statute." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (emphasis in original) (internal quotation marks omitted) (affirming this court's interpretation of a provision in the Indian Gaming Regulatory Act even though that interpretation made the provision's incorporation of chapter 35 of the Internal Revenue Code superfluous). A court should not apply the superfluity canon unless it first determines that the term being construed is ambiguous. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (holding that the plain meaning of the Bankruptcy Code's standards for awarding professional fees controlled even though such a reading made the word "attorney" in the provision at issue "surplusage").

Here, as discussed above, we believe that the statutory definition of the key term "communication" is unambiguous. Although we concede that the plain meaning of

the term renders § 1692b(5) superfluous, we decline to avoid such a result by creating an ambiguity where none exists. Simply because a "statute is awkward . . . does not make it ambiguous on the point at issue." *Lamie*, 540 U.S. at 534. Moreover, the dissent's assertion that information regarding a debt is "conveyed" to a third party even if the third party has no way of ascertaining that fact strikes us as totally inconsistent with, i.e., "repugnant to," the FDCPA's express purpose "to eliminate abusive debt collection practices." 15 U.S.C. § 1692(e).

Finally, with regard to the awarding of costs to GRC under Rule 54(d) of the Federal Rules of Civil Procedure, the dissent fails to acknowledge that the FDCPA's costs provision (15 U.S.C. § 1692k(a)(3)) clearly separates the awarding of costs to the prevailing party from the awarding of attorney's fees. Only the latter is linked to a finding that the action has been brought by the plaintiff in bad faith. To the extent that the dissent relies on the Ninth Circuit case of *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010), in concluding otherwise, we find *Rouse's* analysis unpersuasive for the reasons stated earlier. And the dissent's reliance on the Second Circuit's similar decision in *Emanuel v. American Credit Exchange*, 870 F.2d 805 (2d Cir. 1989), is even more unpersuasive because *Emanuel's* discussion on the costs issue, by the dissent's own concession, was dicta. *See id.* at 808-09. That "dicta" was in fact barely that: it simply restates § 1692k(a)(3) without analysis and contains no application.

AFFIRMED.

10-1363, Marx v. General Revenue Corporation

Lucero, J. dissenting

In affirming the district court, the majority holds that two provisions of the Fair Debt Collection Practices Act ("FDCPA") are wholly superfluous. Such a reading violates central canons of statutory interpretation. Accordingly, I respectfully dissent.

I

Under the FDCPA, a debt collector generally may not communicate with a consumer's employer. The act states:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, *a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer*, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b) (emphasis added).

As the foregoing provision indicates, third-party communications are prohibited by the FDCPA, except those that fit within a safe harbor provision. Section 1692b allows a debt collector to "communicat[e] with any person other than the consumer for the purpose of acquiring location information about the consumer." The term "location information" is limited to "a consumer's place of abode and his telephone number at such place, or his place of employment." § 1692a(7). And the safe harbor provision contains numerous other restrictions. A

debt collector may not state that a "consumer owes any debt" nor "indicate[] that the debt collector is in the debt collection business or that the communication relates to the collection of a debt." § 1692b(2), (5). A debt collector must "identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer." § 1692b(1). And a debt collector may "not communicate by post card." § 1692b(4).

Although these restrictions may appear overly-formalistic, Congress included them for a specific reason. Citing "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices," Congress enacted the FDCPA to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." § 1692(a), (e). By mandating that debt collectors hew closely to a set script, Congress barred those companies inclined to push the limit from gaining a competitive edge.

There can be no dispute that the fax at issue in this case went beyond the form Congress mandated. It included GRC's name, logo, and address, along with GRC's internal "ID" number for Marx's account. It requested the employer's address and corporate payroll address, and Marx's employment status, date of hire, full time/part time status, and the name of her position. Such questions go well beyond a request for "location information" as defined in the FDCPA.

The majority does not consider whether GRC exceeded the permissible scope of the safe harbor provision because it concludes that the fax was not a "communication." The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." § 1692a(2). Marx's account number at GRC plainly constitutes "in-

formation regarding a debt." *Id.* Just as a bank account number is information regarding a bank account, a debt collection agency account number is information regarding a debt. And there can be no doubt that this information was "convey[ed]" to Marx's employer when GRC faxed it. The majority asks what the account number conveys, (*see* Majority Op. 16), but that is not the proper question. Instead, the issue is whether the *fax* conveyed information regarding a debt. It did: it conveyed the debt collection agency account number.

Although the fax at issue meets the written definition of "communication" under the FDCPA, the majority engrafts an additional element onto that definition. It holds that a "communication" must convey information regarding a debt *and* indicate to the recipient of the correspondence that the message relates to the collection of a debt. (*See* Majority Op. 5 ("[A]bsent any evidentiary showing that Ms. Marx's employer either knew or inferred that the facsimile involved a debt, the facsimile does not satisfy the statutory definition of a 'communication.'").)[1] But this extra requirement is not contained in

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[1] In adding an extra condition to the statutory definition of "communication," the majority joins a handful of district courts that appear to have done the same. *See Biggs v. Credit Collections, Inc.*, No. CIV-07-0053, 2007 U.S. Dist. LEXIS 84793 (W.D. Okla. Nov. 15, 2007) (unpublished); *Horkey v. J.V.D.B. & Assocs., Inc.*, 179 F. Supp. 2d 861 (N.D. Ill. 2002); *Padilla v. Payco Gen. Am. Credits, Inc.*, 161 F. Supp. 2d 264 (S.D.N.Y. 2001); *Fava v. RRI, Inc.*, No. 96-CV-629, 1997 U.S. Dist. LEXIS 5630 (N.D.N.Y. April 24, 1997) (unpublished). Those cases, however, are outliers. A majority of courts to have considered the issue have not adopted this narrowed definition. *See Shand-Pistilli v. Prof'l Account Servs.*, No. 10-CV-1808, 2010 U.S. Dist. LEXIS 75056 (E.D. Pa. July 26, 2010) (unpublished); *Thomas v. Consumer Adjustment Co.*, 579 F. Supp. 2d 1290 (E.D. Mo. 2008);

the statutory text, and its addition to the FDCPA's definition of "communication" violates several rules of statutory construction.

First, the plain text of the FDCPA does not require that the recipient of a communication infer that the message relates to debt collection. "Where statutory language is clear and unambiguous, that language is controlling and courts should not add to that language." *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 939 (10th Cir. 1996). Congress selected specific language in defining "communication," and that language does not require that the recipient recognize the communication relates to debt collection. Supplementing the definition is particularly inappropriate in this instance because the FDCPA is to "be construed liberally in favor of the consumer." *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002) (citation omitted). Congress explicitly specified the manner in which debt collectors may contact third parties; it is not our role to expand on the statute.

Second, the majority's interpretation contravenes the rule that if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted); *see also Anderson v. United Tel. Co. of Kan.*, 933 F.2d 1500, 1502 (10th Cir. 1991) ("[T]he legislature's use of two different terms is presumed to be intentional."). Another provision of the FDCPA contains the language the majority interlineates

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Ramirez v. Apex Fin. Mgmt., 567 F. Supp. 2d 1035 (N.D. Ill. 2008); *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006); *Henderson v. Eaton*, No. 01-0138, 2001 U.S. Dist. LEXIS 13243 (E.D. La. Aug. 23, 2001) (unpublished); *West v. Nationwide Credit, Inc.*, 998 F. Supp. 642 (W.D.N.C. 1998).

into the definition of "communication." The FDCPA's safe harbor provision bars a debt collector from "*indicat[ing] that the debt collector is in the debt collection business or that the communication relates to the collection of a debt.*" § 1692b(5) (emphasis added). If Congress intended to limit communications to those messages that imply the existence of a debt, it would have used the language contained in § 1692b(5).

Third, and perhaps most importantly, the majority's construction renders § 1692b(5) superfluous. As a rule, "we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (citation omitted). If the term "communication" refers by definition only to correspondence that implies a debt is being collected, then § 1692b(5) is entirely redundant; there would be no reason to expressly prohibit a debt collector from "indicat[ing] . . . that the communication relates to the collection of a debt," 15 U.S.C. § 1692b(5). Several well-reasoned district court opinions have rejected the majority's interpretation on precisely this basis. *See Henderson*, 2001 U.S. Dist. LEXIS 13243, at *7 ("[Section 1692b] would make no sense if defendant's argument were correct that a letter to a third party seeking location information must indicate a debt collection purpose in order to be subject to the Act."); *West*, 998 F. Supp. at 645 ("Because a narrow interpretation of section 1692c(b) would render other portions of the statute 'superfluous,' the court concludes that section 1692c(b) should be broadly interpreted to prohibit a debt collector, in connection with the collection of any debt, from conveying any information relating to a debt to a third party . . . ."); *see also Thomas*, 579 F. Supp. 2d at 1297 (noting the superfluity issue).

The majority's holding that a "communication" must indicate to the recipient that a debt exists strays from the plain text of the statute and violates several canons of statutory construction. GRC sought more than "location information" and Marx's account number at GRC, regardless of whether it was referred to as an "ID" number, is "information regarding a debt" that was "convey[ed]" to Marx's employer without her permission. § 1692a(2). Accordingly, the fax fits within the plain text definition of "communication" and was prohibited under the FDCPA. *See* § 1692c(b). The district court's contrary conclusion should be reversed.

II

Because I would reverse the district court, I would not reach the issue of costs. However, I disagree with the majority's conclusion with respect to Rule 54(d) as well.

Rule 54(d) permits the prevailing party in a civil action to recover costs "[u]nless a federal statute, these rules, or a court order provides otherwise." Fed. R. Civ. P. 54(d)(1). The FDCPA provides otherwise. It states: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." § 1692k(a)(3).

This language is clear and unambiguous: A district court may award costs to a defendant "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." *Id.* The only sensible reading of this statute is that the district court may *only* award costs to a defendant upon such a finding. *See Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1308 (10th Cir. 2003) ("Under the doctrine of *expressio unius est exclusio alterius*, to 'express or include one thing implies the exclusion of the other, or of the alterna-

tive.'" (quoting Black's Law Dictionary (7th ed. 1999))). To read it otherwise is to suggest Congress passed a statute permitting a cost award conditioned upon a finding of bad faith, but intended to permit cost awards without a finding of bad faith. In other words, the majority concludes again that a portion of the FDCPA is mere surplusage. *But see Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 112.

Both the Ninth and Second Circuits have stated that § 1692k(a)(3) permits an award of costs only upon a finding of bad faith—though the latter did so in dicta. *See Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 701 (9th Cir. 2010) ("[A] prevailing defendant cannot be awarded costs under the FDCPA unless the plaintiff brought the action in bad faith and for the purpose of harassment."); *Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989) ("[S]ection 1692k(a)(3) permits a court to award reasonable attorney's fees and costs only upon a finding that an action under this section was brought in bad faith and for the purpose of harassment." (quotation omitted)). Until today, no circuit had ruled otherwise.

The FDCPA clearly permits an award of costs against a plaintiff only upon a finding that the plaintiff brought a claim in bad faith and for the purpose of harassment. The district court made no such finding here. Accordingly, its award of costs should be reversed regardless of the merits of Marx's claim.

III

For the foregoing reasons, I respectfully dissent.

FILED
United States Court of
Appeals Tenth Circuit
January 30, 2012
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLIVEA MARX,
Plaintiff – Appellant,

v.

GENERAL REVENUE CORPORATION, an Ohio corporation,
Defendant – Appellee,

KEVIN COBB,
Defendant.

CONSUMER FINANCIAL PROTECTION BUREAU,
Amicus Curiae.

No. 10-1363

ORDER

Before **KELLY, LUCERO,** and **GILMAN***, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

---

*The Honorable Ronald Lee Gilman, United States Circuit Court Judge, Sixth Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-02243-RPM

OLIVEA MARX,
Plaintiff,
v.
GENERAL REVENUE CORPORATION,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO ALTER/AMEND JUDGMENT AND ORDER DENYING DEFENDANT'S MOTION FOR REVIEW OF TAXATION OF COSTS

On June 8, 2010, the plaintiff filed a Motion to Alter/Amend the Judgment Pursuant to Fed.R.Civ.P. 59(e), [77], seeking to vacate that part of the order awarding the defendant costs under Fed.R.Civ.P. 54(d) based on 15 U.S.C. § 1692k(a)(3). Support for the plaintiff's position is provided by the opinion of the Ninth Circuit Court of Appeals in *Rouse v. Law Offices.* The defendant responded, asserting that in addition to Rule 54(d), the Court should award costs under Rule 68 because of an offer of judgment prior to trial. The plaintiff responded, challenging the validity of the terms of the Rule 68 offer.

The Ninth Circuit opinion is not persuasive. The statutory language requiring a finding of bad faith and harassment is applicable only for an award of attorney fees and does not displace Rule 54(d). Additionally, costs should be awarded under Rule 68.

The defendant also filed a motion for a review of the Clerk's taxation of costs of $4,543.03, seeking an additional amount for deposition transcripts and travel costs. The additional amounts are not awarded as a matter of this Court's discretion. It is now

ORDERED that the plaintiff's motion to alter/amend the judgment [77] is denied and it is

FURTHER ORDERED that the defendant's motion for review of taxation of costs [81] is denied.

DATED: July 15th, 2010

BY THE COURT:

/s/Richard P. Matsch

Richard P. Matsch, Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-02243-RPM-CBS

OLIVEA MARX,

Plaintiff,

v.

GENERAL REVENUE CORPORATION, an Ohio Corporation and

KEVIN COBB,

Defendants

JUDGMENT

Pursuant to and in accordance with the oral stipulation by counsel at the May 7, 2010 trial preparation conference, it was

ORDERED that defendant Kevin Cobb is dismissed.

This matter was tried to Court on May 17, 2010 Senior District Judge Richard P. Matsch presiding. The trial proceeded to conclusion and the Court found that the plaintiff failed to prove any violation of the statute or regulations. It is

FURTHER ORDERED that judgment is entered in favor of defendant General Revenue Corporation and against plaintiff Olivea Marx. It is

FURTHER ORDERED that defendant General Revenue Corporation shall have its costs by the filing of

a Bill of Costs with the Clerk of this Court within fourteen days of the entry of judgment. It is

FURTHER ORDERED that the Complaint, Amended Complaint and this civil action are dismissed.

DATED at Denver, Colorado, this 17th Day of May, 2010.

FOR THE COURT:

Gregory C. Langham, Clerk

s/J. Chris Smith

By: _____

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

OLIVEA MARX,	)	
Plaintiff,	)	
	)	
vs.	)	:08-cv-02243-RPM-CBS
GENERAL REVENUE	)	
CORPORATION,	)	
Defendant.	)	

TRIAL TO COURT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:30 a.m. on the 17th day of May, 2010, in Courtroom A, United States Courthouse, Denver, Colorado.

[Remainder of page 1 – page 228 omitted]

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. . . .

With respect to the facsimile transmission here, as to whether that's a violation of the law, I find that it is not. When Magistrate Judge Shaffer looked at that, he said it's a factual question and denied the plaintiff's motion for summary judgment on that point. And, it is a factual

question and has to be resolved. I didn't hear any testimony from anybody from the plaintiff's employer about what happened when they received that. So, I don't know. It may well be that for reasons unrelated to the lawsuit itself, plaintiff's counsel chose not to call the employer. But, without testimony from the employer as to what it meant, the question then becomes, for me, what is a reasonable interpretation. It's a reasonable interpretation that somebody is trying to find out whether this Ms. Marx works there, and the other information that's requested on the facsimile. It is certainly a situation where an experienced employer or Nicole, who I believe the plaintiff said was a secretary in HR, would understand that that might be related to a collection. But, that would assume that she knows that the defendant, by name, is a debt collector. But, you know, it could also relate to possible

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seeking other employment. The key question here is what does that ID number say at the top? Does that say to a reasonable person in the employer's position that this is an account we're trying to collect? I don't think so. It's close, but I don't think so.

With respect to the content of the facsimile, and requesting information here about title and when beginning

employment, and so forth, I don't accept the plaintiff's contention that that's a violation of the statute because, as the plaintiff contends, that it's limited to location information, as defined by the statute. I don't accept that argument.

[Remainder of page 230 – page 233 omitted]

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 11-1175

APR 2 2012

In The

Supreme Court of the United States

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

ADAM L. PLOTKIN
Counsel of Record
STEVEN J. WIENCZKOWSKI
621 17th Street, Suite 1800
Denver, Colorado 80211
(303) 296-3566
aplotkin@alp-pc.com
swienczkowski@alp-pc.com

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTIONS PRESENTED

This case involves allegations by Petitioner Olivea Marx that Respondent General Revenue Corporation (GRC) violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (the FDCPA). The questions presented are as follows:

1. Whether the court of appeals erred in affirming the district court's award of costs to GRC as a prevailing party pursuant to Fed.R.Civ.P. 54(d)(1), absent a finding that the lawsuit was brought in "bad faith and for the purpose of harassment" under 15 U.S.C. § 1692k(a)(3).

2. Whether the court of appeals erred in affirming the ruling of the district court that a facsimile document sent by GRC to Petitioner's place of employment did not violate 15 U.S.C. § 1692c(b) because it did not constitute a "communication" as expressly defined under 15 U.S.C. § 1692a(2).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner here and appellant below is Olivea Marx. Respondent here and appellee below is General Revenue Corporation (GRC).

GRC is a wholly-owned subsidiary of SLM Corporation, commonly known as "Sallie Mae." Sallie Mae's business address is: 12061 Bluemont Way, Reston, Virginia, 20190.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-18a)[1] is reported at 668 F. 3d 1174. The judgment entered by the United States District Court for the District of Colorado is unreported. Pet. App. 30a-31a. The district court's order denying post-judgment motions filed by the parties is unreported. Pet. App. 28a-29a.

JURISDICTION

The court of appeals affirmed judgment in favor of GRC on December 21, 2011. A petition for rehearing was denied on January 30, 2012. The petition for writ of certiorari was filed on March 23, 2012. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Petitioner brought her claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*.

With respect to Petitioner's argument that the court of appeals inappropriately affirmed an award of costs to GRC pursuant to Fed.R.Civ.P. 54(d)(1), the

[1] All references herein to "Pet." and "Pet. App." are to the Petition for Writ of Certiorari in case 11-1175, and the appendix attached thereto.

applicable provision at issue is set forth in 15 U.S.C. § 1692k(a)(3), which provides, in pertinent part:

> . . . any debt collector who fails to comply with any provisions of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a)(3).

The first applicable provision relating to Petitioner's second argument that the court of appeals inappropriately affirmed the district court's findings that a facsimile document did not violate the FDCPA's prohibition against third party communications is set forth in 15 U.S.C. § 1692c(b), which states:

> COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with

> any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b).

The second applicable provision relating to Petitioner's second argument is the FDCPA's express definition of the term "communication." The FDCPA defines a "communication" as " . . . the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

STATEMENT OF THE CASE

Petitioner defaulted on her student loan, which was assigned by the guarantor, EdFund, to GRC for collection. Pet. App. 2a. Petitioner filed her lawsuit in October of 2008, alleging various violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* *Id.* Petitioner amended her complaint in March of 2009 to add a claim that GRC violated § 1692c(b) of the FDCPA by sending a facsimile document to Petitioner's place of employment (the fax). *Id.*; *see* Tenth Cir. App. 113. The fax was a standard form utilized by GRC for the purpose of determining a consumer's eligibility for administrative wage garnishment, and states that the purpose of the document is to "verify [e]mployment." Pet. App.

3a. The fax was specifically designed by GRC to avoid any implication of a debt. *Id.* at 5a. The fax requested information regarding the Petitioner's employment status, date of hire, payroll address, position, and whether the Petitioner worked full or part time. *Id.* at 3a. The fax also contained GRC's corporate name and logo, its address, and phone number. *Id.* The fax included an "ID" number which corresponded to Petitioner's internal account number with GRC, with the use of the term "ID" rather than "account" being intentional so not to imply the existence of a debt. *Id.* at 5a.

Following the presentation of the evidence and closing arguments in a one day trial to the court, the district court issued its findings, and concluded that Petitioner failed to prove any violation of the FDCPA. *Id.* at 2a-3a. With respect to Petitioner's claim under § 1692c(b) of the FDCPA, the district court focused on whether the "ID" number contained on the fax conveyed to a reasonable person that the fax related to an attempt to collect a debt. *Id.* at 33a. Based upon the evidence presented at trial, the district court concluded that the fax did not convey to a reasonable person that the fax related to an account GRC was attempting to collect upon. *Id.*[2] Finding that GRC did

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[2] The district court did not, as Petitioner suggests "dismiss" the § 1692c(b) claim (Pet. 7); nor did the district court hold that "a debt collector can contact an employer to ask for information in addition to 'location information' as long as the employer does not know that the request is coming from a debt collector." Pet. 7. Rather, after closing arguments, the district court simply

(Continued on following page)

not violate any provisions of the FDCPA, the district court entered judgment in favor of GRC and against Petitioner. *Id.* at 30a-31a. The district court subsequently awarded GRC its costs pursuant to Fed.R.Civ.P. 54(d)(1) in the amount of $4,543.03, and rejected Petitioner's post-trial argument that 15 U.S.C. § 1692k(a)(3) displaced the presumptive award of costs under Rule 54(d)(1) and required a finding of bad faith and harassment on the part of Petitioner in order to award costs. *Id.* at 28-29a.

Petitioner's appeal to the court of appeals focused on the district court's award of costs and its factual findings that GRC did not violate § 1692c(b) of the FDCPA. The court of appeals affirmed the district court with respect to both issues, with Judge Lucero dissenting. *Id.* at 1a-25a.

The court of appeals rejected Petitioner's argument that 15 U.S.C. § 1692k(a)(3) supersedes the presumptive award of costs to a prevailing party under Fed.R.Civ.P. 54(d)(1) and requires a finding that a lawsuit was brought in bad faith and for harassment purposes as a prerequisite to an award of costs. *Id.* at 7a. In doing so, the court of appeals noted that there is a strong presumption that a prevailing party is entitled to costs, stating:

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noted that there was no evidence from Petitioner as to what the employer interpreted the fax to relate to, which necessitated the court, as the fact finder, to interpret whether the fax conveyed information regarding a debt. Pet. App. 33a.

> [t]he presumption that a prevailing party is entitled to costs is, in our legal system, a venerable one. "Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized. . . ." *Buckhannon Bd. & Care Home, Inc., v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 611 (2001) (quoting *The Baltimore*, 8 Wall. 377, 388 (1869)) (Scalia, J., concurring). A clear showing of legislative intent is needed before we find that Rule 54(d) is displaced by a statute.

Id. at 8a. The court of appeals concluded that no such clear showing of intent is evident in § 1692k(a)(3), stating:

> [w]e believe § 1692k(a)(3) • in both its prevailing-plaintiff and bad-faith provisions • merely recognizes that the prevailing party is entitled to receive the costs of a suit as a matter of course. Nothing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits.

Id. The court of appeals analyzed the legislative history on point, and concluded it was "neutral at best" with respect to Petitioner's argument. *Id.* at 10a-11a.

The court of appeals acknowledged that the Ninth Circuit reached a different result in *Rouse v.*

Law Offices of Rory Clark, 603 F. 3d 699 (9th Cir. 2010), but found the Ninth Circuit's reasoning in *Rouse* that § 1692k(a)(3) supplanted Rule 54(d)(1) unpersuasive. Pet. App. 12a-14a. The court of appeals also noted that the Ninth Circuit applied a different reasoning in *Quan v. Computer Sciences Corp.*, 623 F. 3d 870 (9th Cir. 2010). *Id.* at 12a-13a.

The court of appeals also affirmed the district court's factual findings that GRC did not violate § 1692c(b) of the FDCPA, finding that the fax at issue did not constitute a "communication" under the FDCPA because it did not expressly or implicitly, directly or indirectly, convey information regarding a debt, as required under the definition provided in § 1692a(2). *Id.* at 4a-6a. The court of appeals focused on the importance of the meaning of the word "convey" as contained in the definition of "communication" under § 1692a(2), stating:

> [t]o convey is to impart, to make known. If one drafts a letter full of unlawful collection threats, but never mails it, nothing is conveyed. So, too, if the "communication" is in Sanskrit. The fax here never used the words "debt," "collector," "money," "obligation," or "payment."

Id. at 15a. The court of appeals observed that verification of employment is common place and that "[a] party may seek to verify employment status (without hinting at a debt) for any number of reasons, including as part of processing a mortgage, conducting a

background check before hiring, or determining eligibility for an extension of credit." *Id.* at 5a.

The court of appeals rejected the argument advanced by Petitioner and the dissent that the document conveyed or implied the existence of the debt because the fax contained an identification number that corresponded with Petitioner's account number with GRC, stating: "[t]he dissent instead relies on the account number, but what does this convey? It is a jumble of numbers, designed for internal identification purposes, the functional equivalent of a bar code." *Id.* at 15a.

While the court of appeals noted that Petitioner did not present any evidence relating to what Petitioner's employer "either knew or inferred" regarding the fax (Pet. App. 5a, 16a), the court did not, contrary to Petitioner's argument, create a subjective standard which would *require* such evidence in order to create a violation of § 1692c(b). The court of appeals simply applied the definition of "communication" to the four corners of the document at issue, and affirmed the district court's factual findings that the document did not violate § 1692c(b)'s prohibition against "communications" with third parties. Pet. App. 4a-6a.

REASONS FOR DENYING THE PETITION

The decision below is correct with respect to both issues that are the subject of Petitioner's appeal. The court of appeals' finding that § 1692k(a)(3) does not

supplant presumptive costs under Rule 54(d)(1) conflicts only with a single decision issued by the Ninth Circuit in 2010, a decision the court of appeals discussed in detail, and rejected based upon the application of the plain meaning of the statutory language at issue, the legislative history, and case law which almost uniformly rejects the notion that "good faith" exempts a non-prevailing party from the application of Rule 54(d)(1). Pet. App. 6a-14a. Neither issue bears on any legal issue of broad importance. Moreover, the court of appeals' affirmance of the district court's factual findings relating to the alleged violation of § 1692c(b) does not conflict with any decision of this Court or any other court of appeals, and applied the express statutory definition to the specific factual issues presented in this case. Accordingly, GRC submits that further review is not warranted.

I. The Finding of the Court of Appeals that 15 U.S.C. § 1692k(a)(3) does not Displace Presumptive Costs Allowed Under Rule 54(d)(1) does not Conflict with any Decisions of this Court and Only Conflicts with one Other Court of Appeals

Petitioner argues that the court of appeals' finding that § 1692k(a)(3) does not supplant the presumptive award of costs under Fed.R.Civ.P. 54(d)(1) conflicts with both the Ninth and Seventh Circuits. Pet. 13. Petitioner correctly states that the Ninth Circuit reached a different result interpreting

the same provision of the FDCPA in *Rouse v. Law Office of Rory Clark*, 603 F. 3d 699 (9th Cir. 2010) (Pet. 12), but incorrectly states that the opinion conflicts with a decision in the Seventh Circuit in *Gwin v. American Rover Transportation Co.*, 482 F. 3d 969, 974 (7th Cir. 2007). Pet. 13.[3] While the decision of the court of appeals did depart from the findings of the Ninth Circuit in *Rouse*, GRC submits that the fact that two circuits have recently come to different conclusions as to whether a prevailing defendant should be awarded costs under the FDCPA is not so significant of a circuit split that this Court needs to resolve the conflict. Moreover, the analysis and

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[3] In *Gwin*, the Seventh Circuit addressed language contained in 46 U.S.C. § 2114(b), rejecting an argument that the applicable provision of that Act did not supersede the award of costs set forth in Rule 54(d). *Gwin*, 482 F. 3d at 974. The statutory provision at issue in the Seaman's Protection Act is not similar in structure or in substance to the applicable provision contained in the FDCPA, and is not in conflict with the opinion of the court of appeals. In contrast to the language at issue under the FDCPA, the language at issue in the Seaman's Protection Act can fairly be read to expressly limit an award of *either* costs or attorney's fees only to cases where there has been a finding that the case is frivolous or brought in bad faith. As discussed in this Brief in Opposition, this is simply not the case with the language at issue under the FDCPA. This is the same distinction reached by the court in *Thomasson v. GC Servs. Ltd. P'ship*, 2007 U.S. Dist. LEXIS 79855, at * 5-6 (S.D. Cal. October 27, 2007) (While *Thomasson* was not directly referred to or overruled by the Ninth Circuit in *Rouse*, 603 F. 3d 699 (9th Cir. 2010), GRC recognizes that its conclusion that § 1692k(a)(3) does not displace Rule 54(d)(1) is presumably no longer instructive in the Ninth Circuit).

conclusion of the Tenth Circuit adhered to the statutory framework at issue and is consistent with the presumptive rule that a prevailing party should recover its costs under Rule 54(d)(1).

The court of appeals appropriately recognized that there is a strong presumption that a prevailing party is entitled to costs. Pet. App. 8a. This finding is consistent with the statement by this Court that "[b]ecause costs are usually assessed against the losing party, liability for costs is a normal incident of defeat." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 352, 101 S. Ct. 1146, 1150, 67 L. Ed. 2d 287 (1981). As recognized by the court of appeals, the denial of costs "'is in the nature of a severe penalty,' such that there 'must be some apparent reason to penalize the prevailing party if costs are to be denied.'" Pet. App. 14 (quoting *Klein v. Grynberg*, 44 F. 3d 1497, 1507 (10th Cir. 1995)), which is consistent with the finding of other courts of appeals.[4] The notion that the denial of

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[4] *See, e.g., Zenith Insur. Co. v. Breslaw*, 108 F. 3d 205, 207 (9th Cir. 1997) (finding that the denial of costs under Rule 54(d) " . . . operates to punish the prevailing party for some impropriety during the course of the litigation.") (citing *National Info. Servs. v. TRW, Inc.*, 51 F. 3d 1470, 472 (9th Cir. 1995)), *overruled on other grounds in Mexican-American Educators v. State of California*, 231 F. 3d 572, 593 (9th Cir. 2000); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F. 2d 728, 730 (6th Cir. 1986) (stating that the district court may exercise its discretion to deny costs "where the prevailing party should be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues"); *Popeil Bros., Inc. v. Schick Elec., Inc.*, 516 F. 2d 772, 775 (7th Cir. 1975) (stating " . . . the penalty of denial or

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costs is penalizing in nature is also consistent with this Court's statement that assumes that costs will be denied to a prevailing party "only when there would be an element of injustice in a cost award." *Delta Air Lines, Inc.*, 450 U.S. 346, 101 S. Ct. 1146, 1151 n. 14, 67 L. Ed. 2d 287 (1981). Similarly, the court of appeals appropriately noted that most circuits have rejected the notion that a non-prevailing party's "good faith," standing alone, is insufficient to deny the application of Rule 54(d)(1). Pet. App. 10a. (citing *Pacheco v. Mineta*, 448 F. 3d 783, 794 (5th Cir. 2006) (collecting cases)).

The court of appeals' analysis of the language at issue (§ 1692k(a)(3)) is correct. The court of appeals appropriately concluded that "[n]othing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits." Pet. App. 8a. Instead, the language of § 1692k(a)(3) indicates "two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.' Attorney's fees and costs are legally distinct categories of monetary allowances made to successful litigants. . . ." *Id.* at 7a.[5]

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apportionment of costs under Rule 54(d) should be imposed only for acts or omissions on the part of the prevailing party in the actual course of litigation. . . .").

[5] Contrary to Petitioner's assertion, the court of appeals did not "contradict itself" in its analysis of the statutory provision at

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Despite the presumption that costs should be awarded to a prevailing party, Petitioner appears to urge that the mere mention of costs in § 1692k(a)(3) equates to "provid[ing] otherwise" within the meaning of Rule 54(d)(1), and thereby displaces the application of costs to a prevailing defendant. There is nothing contained in the plain language of 15 U.S.C. § 1692k(a)(3) which provides that a defendant in an FDCPA case may recover costs *only* upon a finding that a plaintiff brought the case in bad faith and for the purpose of harassment. Moreover, there is nothing whatsoever contained in the plain language of this provision which purports to override Rule 54(d)(1) and the general presumption that a prevailing party may recover its costs. Had Congress intended to limit an award of costs "only" upon a finding of bad faith, it could have expressly so stated. The applicable provision can reasonably be read, as the court of appeals agreed, that when an action is brought in bad faith and for the purpose of harassment, *in addition to the costs that every prevailing party is entitled to*, a prevailing defendant is also

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issue. Pet. 9. Petitioner argues that the court of appeals initially stated that § 1692k(a)(3) "provide[s] otherwise" than Rule 54(d) by ruling that the bad faith clause is only linked to the attorney's fee provision, and as to costs, the statute "merely recognizes that the prevailing party is entitled to costs as a matter of course." *Id.* (citing Pet. App. 8a). The court of appeals did *not* hold that § 1692k(a)(3) "provides otherwise" than Rule 54(d) in any respect and, central to its ruling, consistently stated that the statute did not so displace the presumptive award of costs under Rule 54(d). Pet. App. 7a, 8a, 11a.

entitled to recover reasonable attorney's fees. The court of appeals recognized the clear intent of the statutory provision to state that in the event of a case filed in bad faith or for harassment, the aggrieved party is to receive reasonable attorney's fees in addition to costs, not as an exclusive remedy.

As recognized by the court of appeals, the legislative history relating to § 1692k(a)(3) does not support Petitioner's argument. The applicable Senate Report in one portion mentions "costs" as part of an award upon a finding of bad faith and harassment on the part of the consumer, but in its summary of the applicable provisions of the FDCPA, it omits costs altogether and explains that a court may award attorney's fees upon a finding of bad faith and harassment. Pet. App. 11a (quoting applicable provisions of S. Rep. No. 95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1700, 1702). The court of appeals concluded that, read together, "[t]he Report nowhere indicates that the FDCPA's cost provision was intended to displace this long-standing rule of civil procedure. The fact that the FDCPA post-dates Rule 54, or that the FDCPA should be construed 'liberally,' does not change this result." Pet. App. 11a.[6]

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[6] It should be noted that, despite the fact that the section-by-section analysis provided in the Senate Report does not mention "costs" as being tied to the bad faith and harassment purposes clause, the Ninth Circuit in *Rouse* glosses over this important point by simply stating, "[h]owever, nowhere does the Report state an intention that costs be a factor in determining

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While the decision of the court of appeals did depart from the findings of the Ninth Circuit in *Rouse*, the court of appeals appropriately recognized that the logic applied in *Rouse* departed from the Ninth Circuit's own decision in *Quan v. Computer Sciences Corp.*, 623 F. 3d 870 (9th Cir. 2010) when it determined that ERISA's costs and attorneys' fees provision (29 U.S.C. § 1132(g)(1)) did not supplant Rule 54(d)'s presumption of costs because " . . . 'the statute or rule would have to bar an award of costs to a prevailing party,'" and held that the applicable ERISA provision did not so preclude costs. *Id.* at 12a-13a (quoting *Quan*, 603 F. 3d at 88).[7] As pointed out

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the reasonableness of attorney's fees." *Rouse*, 603 F. 3d at 705. Therefore, rather than address whether the applicable provision obviates the presumption that a prevailing party is to be awarded costs under Rule 54(d)(1), the Ninth Circuit appeared to be primarily focused on how courts traditionally calculate the award of attorney's fees.

[7] Petitioner states that the court of appeals "wrongly suggested" the inconsistency of the Ninth Circuit on this point, arguing that " . . . both the ERISA provision and Rule 54(d)(1) allow, but do not require district courts to award costs . . . ," and that *Rouse* found that the FDCPA "barred" an award of costs in "some circumstances." Pet. 12-13, n. 2. Petitioner obfuscates the presumptive language of Rule 54(d)(1)'s cost provision and incorrectly suggests that the ERISA provision stating "the court in its discretion may allow attorney's fees and costs" is the functional equivalent of Rule 54(d)(1)'s language. Rule 54(d)(1) expressly states that costs "should be allowed" unless a statute or rule "provides otherwise." Moreover, the point missed by the Petitioner is that the court in *Quan* held that a statute or rule must "bar" an award of costs. *Quan*, 623 F. 3d at 888. Nothing in the language contained in § 1692k(a)(3) can fairly be read to "bar" an award of costs.

by the court of appeals, Title 15 of the U.S. Code contains varying languages relating to fees and costs, noting that "[s]ome provisions mention 'costs'; some do not; some mention attorney's fees as part of the costs." Pet. App. 12a. The Ninth Circuit in *Rouse* is the only circuit to have found that any of these provisions displaced Rule 54(d). *Id.*

In rendering its decision in *Rouse*, the Ninth Circuit relied heavily on the general proposition that the FDCPA should be construed "liberally." *Rouse*, 603 F. 3d at 705-06. Petitioner also relies upon a similar notion and argues that " . . . FDCPA plaintiffs are, by and large, people in debt who might be deterred from challenging abusive and deceptive collection practices by the possibility of being held liable for the defendant's costs in non-frivolous cases." Pet. 15. The problem with such a reliance on the presumption that the FDCPA is to be construed "liberally" in favor of a consumer is that it inappropriately concludes that the "liberal" construction with respect to the regulation of debt collection activities necessitates the usurpation of long-standing principles such as the award of costs to a prevailing party under Rule 54(d)(1), despite the fact that no express intent to negate Rule 54(d)(1) is found anywhere in the FDCPA. It also ignores an equally-important stated purpose of the FDCPA "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."

15 U.S.C. § 1692. To deny a debt collector defendant the right to recover what is presumptively recoverable for a prevailing party under Rule 54(d)(1) would unfairly disadvantage an FDCPA defendant who, as in this case, has not been found to have violated any provision of the Act. This is not only contrary to the stated purpose of the FDCPA, it is tantamount to an unsupported penalty against a prevailing FDCPA defendant. Such a result cannot reasonably be read from the express language contained in 15 U.S.C. § 1692k(a)(3); nor can it fairly be read as an intended result based upon the FDCPA's stated purpose or its legislative history.

II. The Fact-Based Ruling that the Document at Issue did not Constitute a "Communication" under the FDCPA does not Conflict with any Decisions of this Court or any Other Appellate Courts; nor does it Raise any Issue of Broad Importance which would Warrant this Court's Review

The court of appeals' affirmance of the district court's factual findings that GRC did not violate § 1692c(b) of the FDCPA does not conflict with any decision issued by this Court, or any other courts of appeals, and is an entirely reasonable application of the statutory definition at issue based upon the facts presented during trial. Review by this Court is not warranted.

The opinion below stands for the rather unremarkable proposition that in order for Petitioner to have proven a violation of § 1692c(b), the third party contact at issue must meet the express definition of "communication" set forth in the FDCPA. This is clear by the express language of the provision. The court of appeals did not, as Petitioner and dissent urge "engraft" any additional requirements under the FDCPA; rather, the court simply applied the definition of "communication" to the particular contact at issue in this case. Pet. App. 4a-6a. Petitioner portends that the court of appeals' decision will result in a "broad range of intrusive inquiries about the consumer." Pet. 17. However, no such outcome can reasonably be foreseen from the decision below as the court simply affirmed the district court's factual findings that the document sent to Petitioner's place of employment "cannot be construed as 'conveying' information 'regarding a debt.'" Pet. App. 4a. Whether a particular contact meets the definition of a "communication" as specifically defined under the FDCPA necessitates a factual inquiry applied on a case-by-case basis. As stated by this Court:

> [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence different. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). In affirming the district court's factual findings in this case, the court of appeals adhered to this standard. Pet. App. 4a. While Petitioner argues that the finder of fact in this case should have determined that GRC violated § 1692c(b), the district court's factual determinations in this regard are entitled to deference. *Brown v. Plata*, 131 S. Ct. 1910, 1929, 179 L. Ed. 2d 969, 988 (2011) ("Deference to trial court factfinding reflects an understanding that '[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.'") (quoting *Anderson*, 470 U.S. at 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518)).

Unable to cite any contrary ruling by either this Court or any other courts of appeal, Petitioner relies upon the flawed argument that the court of appeals' decision "contradicts the view of the federal banking regulators, including the [Consumer Financial Protection Bureau], the Office of the Comptroller of the Currency, and the Federal Reserve Board." Pet. 19. As an initial matter, the manuals and handbooks cited by Petitioner are not entitled to deference. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621, 631 (2000) ("Interpretations such as those in opinion letter – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style

deference.") (citations omitted). Moreover, the statements contained in the non-binding materials cited by Petitioner are unpersuasive, as they only broadly discuss the provisions of the FDCPA, without any analysis of the term "communication" as specifically defined under § 1692a(2), and without any discussion as to whether the type of document that was presented to the fact-finder in this case constitutes a *per se* "communication" under the FDCPA.

Petitioner further urges that the decision below "runs counter to the decisions of more than twenty district courts spread throughout fifteen federal judicial districts," in which these district court decisions "have read the provision to state an objective test that looks to the content of the information sent to determine whether it 'convey[ed] information regarding a debt directly or indirectly. . . .'" Pet. 20. Petitioner then provides a string citation of district court cases applying an "objective" test. *Id.*

However, the fact-finder in this case (the district court judge) applied precisely the objective test Petitioner promotes. With respect to whether the "ID" number on the document "conveyed information regarding a debt," the district court evaluated whether that account number included on the document would " . . . say to a reasonable person in the employer's position that this in an account we're trying to collect," and determined it did not. Pet. App. 33a. The court of appeals agreed. It is on this point that Petitioner mischaracterizes the court's holding. While the court of appeals found it curious that Petitioner

elected not to put on any evidence regarding how the recipient of the fax interpreted the fax (Pet. App. 5a, 16a), its reference to this fact was not a part of its holding. Nowhere in the opinion did the court of appeals state that such testimony is *required* in order to prove a violation of § 1692c(b). Accordingly, both the district court and court of appeals evaluated the document at issue objectively and determined that it simply did not satisfy the express definition of a "communication" under the FDCPA. Pet. App. 4a-6a; 15a-16a; 33a.

The vast majority of the district court decisions string cited by Petitioner in support of an "objective test" under § 1692a(2) (Pet. 20-21) evaluated the definition of "communication" in the context of alleged violations of provisions of the FDCPA other than § 1692c(b).[8] Of those few district court decisions

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[8] *See, e.g., Lensch v. Armada Corp.*, 795 F. Supp. 2d 1180, 88-89 (W.D. Wash. 2011); *Yarbrough v. FMS, Inc.*, 2010 U.S. Dist. LEXIS 123459, at * 4-5 (S.D. Fla. 2010); *Hutton v. C.B. Accounts, Inc.*, 2010 U.S. Dist. LEXIS 77881, at * 4-7 (C.D. Ill. 2010); *Krug v. Focus Receivables Mgmt., LLC*, 2010 U.S. Dist. LEXIS 45850, at * 4-9 (D.N.J. 2010); *Nichols v. CMRE Fin. Servs.*, 2010 U.S. Dist. LEXIS 25373, at * 8 (D.N.J. 2010); *Inman v. NCO Fin. Sys.*, 2009 U.S. Dist. LEXIS 98215, at * 6-11 (E.D.Pa. 2009); *Mark v. J.C. Christensen & Associates, Inc.*, 2009 U.S. Dist. LEXIS 67724, at * 4-9 (D. Minn. 2009); *Savage v. NIC, Inc.*, 2009 U.S. Dist. LEXIS 65071, at * 13-14 (D. Ariz. 2009); *Edwards v. Niagra Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1358-59 (N.D. Ga. 2008); *Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d 1035, 1040-42 (N.D. Ill. 2009); *Costa v. Nat'l Action Fin. Serv.*, 634 F. Supp. 2d 1069, 1076-77 (E.D. Cal. 2007); *Leyse v. Corp. Coll. Servs.*, 2006 U.S. Dist. LEXIS 67719, at * 15-18

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which evaluated the term "communication" in the context of an alleged § 1692c(b) violation, the majority of those cases related to a telephone call, rather than a document as relevant here. For example, Petitioner specifically refers to *West v. Nationwide Credit*, 998 F. Supp. 642 (W.D.N.C. 1998). Pet. 21. In *West*, the plaintiff alleged that the defendant's representative called plaintiff's neighbor regarding a "very important" matter. *West*, 998 F. Supp. at 643. In denying the defendant's motion to dismiss, a U.S. Magistrate Judge determined that the telephone call constituted a "communication" and, therefore, the plaintiff's allegations were sufficient to state a claim. *Id.* at 645. While the court in *West* determined that a broader interpretation of the term "communication" was appropriate, the factual circumstances in that case are distinguishable from this case, both in form and in substance. In *West* it appears to have been undisputed that the telephone call at issue was made in order to make contact with the plaintiff in an attempt to collect the debt. That is simply not the case in the present action.

None of the cases relied upon by Petitioner addressed factual determinations made at trial, as occurred in the case at bar. In addition, very few of the cases relied upon by Petitioner even address a factual situation similar to the present action. For example,

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(S.D.N.Y. 2006); *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104, 1115-16 (C.D. Cal. 2005).

in *Shand-Pistilli v. Prof'l Account Servs.*, 2010 U.S. Dist. LEXIS 75056, at * 10 (E.D. Pa. 2010), the district court denied the defendant's motion to dismiss pursuant to Rule 12(b)(6), finding that the plaintiff sufficiently alleged a violation of § 1692c(b) relating to a letter sent to the plaintiff's employer. However, later, the court granted the defendant's motion for summary judgment as to that claim, finding that the plaintiff failed to raise a genuine issue of material fact on that claim. *Shand-Pistilli v. Prof'l Account Servs.*, 2011 U.S. Dist. LEXIS 64446, at * 9-10 (E.D. Pa. 2011).

The cases cited by Petitioner do not address the situation the district court and court of appeals evaluated in this case, that is, a finding after a full trial on the merits relating to "a single fax, innocuous, nondescript, and harmless, which GRC sent only to gather information to weigh the statutory right of garnishment." Pet. App. 16a. The court of appeals appropriately rejected the dissent's reliance on the same cases cited by Petitioner, noting: "every one of the dissent's cases is a ruling on a 12(b)(6) or summary judgment motion, which means that those courts lacked what we have: a trial at which plaintiff conceded on the stand that she has no evidence that her employer suspected that the fax concerned a debt." *Id.* Moreover, as Petitioner recognizes, there are district courts which have found, based upon the factual circumstances presented in those cases, that certain contacts under the FDCPA do not amount to a "communication." Pet. 22, n. 6 (collecting cases). For

example, in *Biggs v. Credit Collections, Inc.*, 2007 U.S. Dist. LEXIS 84793 (W.D. Okla. Nov. 15, 2007), the district court for the Western District of Oklahoma found that certain voicemail messages did not constitute "communications" under the FDCPA. In denying summary judgment in favor of the plaintiff with respect to certain voice mails, the court stated:

> Words matter – in this instance, the words of the voice mails and the words of the statutory definition of a "communication." The transcript of the voice mail messages demonstrates that the voice mails "convey[ed] no information regarding a debt." No amount of liberal construction can broaden the statutory language to encompass the words recorded in these voice mails.

Biggs, 2007 U.S. Dist. LEXIS at * 12-13.

In *Fava v. RRI, Inc.*, 1997 U.S. Dist. LEXIS 5630 (N.D.N.Y. 1997), a district court in the Northern District of New York found that a facsimile document sent to a third party by a debt collector did not violate 15 U.S.C. § 1692c(b) because it did not convey any information regarding a debt, and therefore did not meet the definition of "communication" under 15 U.S.C. § 1692a(2). In *Padilla v. Payco Gen. Am. Credits, Inc.*, 161 F. Supp. 2d 264 (S.D.N.Y. 2001), the plaintiff alleged, *inter alia*, that a debt collector violated § 1692c(b) of the FDCPA by contacting a secretary at plaintiff's place of employment and inquiring about her salary, pay schedule, and employment status. *Padilla*, 161 F. Supp. 2d at 267. The

court stated that the allegations, " . . . if true, could be a violation of 15 U.S.C. § 1692c(b), *if the receptionist became aware that Payco was seeking to collect a debt.*" *Id.*, at 274 (emphasis added) (citation omitted). The court concluded that if the collector simply verified employment during the conversation with the receptionist, this would not amount to an improper communication in connection with the collection of a debt. *Id.*

In sum, while some district courts have found certain contacts (mostly telephone calls) to be "communications" under various provisions of the FDCPA, others have not. The determination of whether a particular contact is or is not a "communication" is a fact-driven inquiry which is inevitably tied to the particular contact at issue.

Petitioner is essentially asking this Court to make a determination that any and all "contact" with a third party that does not qualify as one of the expressly stated exceptions is a *per se* violation of the FDCPA. "When a statute's text is plain and unambiguous . . . the statute must be applied according to its terms." *Carcieri v. Salazar,* 555 U.S. 379, 380, 129 S. Ct. 1058, 1059, 172 L. Ed. 2d 791, 795 (2009) (citing *United States v. Gonzales*, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) and *Dodd v. United States*, 545 U.S. 353, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005)). If Congress meant for Petitioner's interpretation of § 1692c(b) to apply, it certainly could have simply left out the term "communicate" and "in connection with the collection of a debt" and

stated plainly that no "contact" may be made to a third party unless it met one of the expressly stated exceptions. The court of appeals appropriately recognized that the definition of "communication" is unambiguous (Pet. App. 16a-17a), and appropriately determined that the third party contact at issue in this case did not "convey" information regarding a debt. Pet. App. 4a-6a.

As summarized by the court of appeals: "[t]he substance of the supposed infraction here is manifestly not the sort of conduct the FDCPA is meant to quell" (Pet. App. 16a), recognizing that § 1692c(b) " . . . is meant to protect debtors from harassment, embarrassment, loss of job, denial of promotion." Pet. App. 16a. Petitioner's fears that the decision below will undermine other provisions of the FDCPA is unwarranted. In this regard, Petitioner suggests that if courts were to apply the court of appeals' interpretation of "communication" in this case, it may render §§ 1692d(6), e(8), e(9), or e(11) "inoperable." Pet. 16-18. Petitioner reads into the opinion below a more restrictive interpretation of "communication" than the court actually stated. For example, the court of appeals did not, as Petitioner suggests, find that the definition would not apply as a matter of law to a document that "did not mention a debt" or to situations in which the information that was transmitted did not "indicat[e] that the consumer owed a debt." Pet. 18. Instead, the court of appeals applied the plain and unambiguous language set forth in § 1692(a)(2) to determine that the specific contact in

this case did not meet the definition of "communication" under the Act. Moreover, Petitioner overlooks the fact that even if a certain contact is deemed not to be a communication for purposes of § 1692c(b), other provisions of the FDCPA offer protection. For example, sections 1692d, 1692e, and 1692f prohibit harassment, abuse, false or misleading representations, and "unfair practices," all of which provide protection for a consumer, with very few of those sections requiring that there be a "communication" in order to deem certain conduct to be a violation.[9] Accordingly, even if a contact is not determined to be a "communication"

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[9] Section 1692d provides: "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." This provision provides a non-exclusive list of the type of conduct which amounts to a violation of this provision. The list of prohibited conduct does not refer to a "communication" at all, and instead refers to such conduct as "causing a telephone to ring. . . ." *See* 15 U.S.C. § 1692d(1)-(6). Under § 1692e of the FDCPA: "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." This section of the FDCPA also provides various non-exclusive examples of what amounts to a violation of this provision, and only refers to a "communication" in subsections (8), (9), and (11). *See* 15 U.S.C. § 1692e (1)-(16). Section 1692f prohibits the " . . . unfair or unconscionable means to collect or attempt to collect any debt." As with §§ 1692d and 1692e, § 1692f provides a non-exclusive list of what constitutes a violation under this provision, and only subparts (7) and (8) relate to a "communication." *See* 15 U.S.C. § 1692f(1)-(8).

for purposes of § 1692c(b), it certainly does not preclude other potential violations of the FDCPA.[10]

In sum, the opinion of the court of appeals is not contrary to any decision of this Court or any other courts of appeals. Moreover, there is no support in either the express language of the statute or interpreting case law which supports Petitioner's one-size-fits-all approach to the definition of "communication" as applied to § 1692c(b). In this case, the district court and court of appeals appropriately applied the definition to the facts presented at trial. As such, the decision below will not foster confusion amongst the lower courts, as they are sufficiently equipped to apply the express language of the statute to the specific factual circumstances presented in a case-by-case basis.

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[10] For example in *Horkey v. J.D.B. Associates*, 179 F. Supp. 2d 861 (N.D. Ill. 2002), the district court found that the defendant's contact with the plaintiff's co-worker did not violate § 1692c(b) because "it was merely limited to inquiring as to Plaintiff's whereabouts . . . " but determined the use of profane language violated § 1692d(2) of the FDCPA) *Id.* at 868.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ADAM L. PLOTKIN
Counsel of Record
STEVEN J. WIENCZKOWSKI
621 17th Street, Suite 1800
Denver, Colorado 80211
(303) 296-3566
aplotkin@alp-pc.com
swienczkowski@alp-pc.com

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REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-1175

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

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INTRODUCTION

Respondent General Revenue Corporation (GRC) acknowledges a conflict among the circuits as to whether a prevailing defendant in a case brought under the Fair Debt Collection Practices Act (FDCPA) may be awarded costs without a finding that the lawsuit was "brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). GRC argues that the decision below was correct in holding that costs may be awarded under Federal Rule of Civil Procedure 54(d), even absent such a finding. GRC's textual theory, however, like the Tenth Circuit's, reads "and costs" out of § 1692k(a)(3).

As to whether the FDCPA's strict limits on communications with third parties cease to apply when a debt collector, contacting a third party in connection with the collection of a debt, does not indicate the reason for the communication, GRC relies on the mantra that the decision below was fact-based. GRC fails to appreciate that the appellate court's application of the facts reflected its particular interpretation of the FDCPA and that it is the meaning of that statute that is at issue here. In addition, GRC makes no attempt to explain how the Tenth Circuit's decision is consistent with the FDCPA's strict limitations on debt-collector communications with employers. Indeed, GRC's failure to contest the point highlights that the Tenth Circuit's reading effectively strips the "location information" restriction and other important FDCPA provisions from the statute.

ARGUMENT

1. As GRC recognizes, Rule 54(d) does not permit an award of costs to a prevailing party if a federal statute "provides otherwise." The FDCPA provides that, "[o]n a finding by the court that an action under this section was

brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). By conditioning the authority to award both fees and costs on a finding that an action was brought in bad faith and for the purpose of harassment, the FDCPA "provides otherwise" than Rule 54(d).

GRC concedes that the Tenth Circuit's holding that the FDCPA does not displace Rule 54(d) as to cost awards to defendants directly conflicts with a decision of the Ninth Circuit that came to the opposite conclusion on the same issue, *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010). GRC Resp. 10.[1] Although GRC suggests that the conflict between these two circuits is not "so significant of a split" as to warrant the Court's attention, these circuits cover 15 states (and two U.S. territories) and the issue arises in an area of frequent litigation, as evidenced by the sample of FDCPA cases cited in the petition and response. Thus, even putting aside the conflict with the Seventh Circuit's decision in *Gwin v. American Rover Transportation Co.*, 482 F.3d 969 (7th Cir. 2007), discussed in the petition (at 13) and below, the conflict warrants this Court's attention.

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[1] Focusing on a statement in *Rouse* addressing the Senate Report, GRC criticizes that opinion for focusing on the wrong point. GRC Resp. 14 n.6. That criticism is wholly unjustified, as, read in context, the statement in *Rouse* was plainly responding to the specific argument made by the defendant in that case—that the reference to "costs" in § 1692k(a)(3) was intended to mean only that the fee award must be "reasonable in relation to the work expended and to costs." Like the Ninth Circuit in *Rouse*, the Tenth Circuit here rejected that reading of the statute and acknowledged that the function of "and costs" in § 1692k(a)(3) is to authorize an award of costs. *See* Pet. App. 7a-8a.

GRC seeks to make Ninth Circuit precedent seem inconsistent by citing *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010), which held that a provision of ERISA did not "provide otherwise" than Rule 54(d). To begin with, even if GRC were correct that the reasoning in *Rouse* and *Quan* was inconsistent, that point would not alter the fact, acknowledged by GRC, that the binding precedent in the Ninth Circuit is that costs are not available to a defendant in an FDCPA case absent a finding that the case was brought in bad faith and for the purpose of harassment. Moreover, the ERISA provision at issue in *Quan* allows a court to award costs "in its discretion," which is effectively the same standard as that in Rule 54(d), which provides for an award of costs "[u]nless a federal statute, these rules, or *a court order* provides otherwise" (emphasis added). GRC omits "court order" when it quotes the Rule. The remainder of GRC's argument as to *Quan* is addressed in the petition (at n.2).

While conceding the direct conflict with the Ninth Circuit, GRC disputes in a footnote the conflict with the Seventh Circuit's decision in *Gwin*. GRC argues that the statute at issue in *Gwin* could be read to limit a cost award to cases brought in bad faith, but that § 1692k(a)(3) cannot be. GRC does not, however, explain how the two statutes could reasonably be read differently. In fact, as explained in the petition (at 13), the statutory language at issue in *Gwin* was strikingly similar to the language at issue here, and the argument rejected by the Seventh Circuit in that case is precisely the one accepted by the Tenth Circuit.[2]

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[2]The provision at issue in *Gwin*, 46 U.S.C. § 2114(b)(4), provided that, in an action brought by a seaman under subsection 2114(a), the court may award "costs and reasonable attorney's fees

(continued...)

Having acknowledged the circuit split, GRC spends the bulk of its response arguing that the decision below was correct. GRC (at 11-12) begins with the uncontested point that Rule 54(d) does not itself require a showing of bad faith, but the question here is whether the Rule applies at all. As GRC must agree, Rule 54(d), by its express terms, does not apply if a "federal statute . . . provides otherwise."

Turning to § 1692k(a)(3), GRC quotes the Tenth Circuit's statement that § 1692k(a)(3) "indicate[s] two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the word expended' and (2) 'costs.'" Pet. App. 7a, *quoted in* GRC Resp. 12. It argues that this provision does not limit costs "only" to cases brought in bad faith and for the purpose of harassment and that, if Congress had intended to do that, it would have "expressly so stated." GRC Resp. 13. But as GRC implicitly accepts, Congress need not use the word "only" to limit an award to the conditions stated in a statute. Thus, even GRC does not argue that § 1692k(a)(3) permits an attorney's fee award to a defendant in a case that was not brought in bad faith or for the purpose of harassment, notwithstanding the absence of the word "only."

GRC (at 14) resorts to rewriting § 1692k(a)(3), suggesting that, "in the event of a case filed in bad faith or for harassment, the aggrieved party is to receive reasonable attorney's fees in addition to costs, not as an exclusive remedy." But Congress did not say "in addition to."

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[2](...continued)
to a prevailing employer not exceeding $1,000 if the court finds that a complaint filed under this section is frivolous or has been brought in bad faith." *See Gwin*, 482 F.3d at 974.

Rather, as the § 1692k(a)(3) states and the language GRC quotes from the Tenth Circuit recognizes, § 1692k(a)(3) addresses an award of costs to a defendant in precisely the same way it addresses an award of fees—in a single provision that imposes the same condition on both.

Finally, GRC (at 16) mentions that other statutory provisions in Title 15 of the U.S. Code address awards of costs, fees and costs, or fees alone. Although GRC's statement is true, several of those provisions are worded very differently from § 1692k(a)(3), and none has been the subject of a circuit court decision addressing the relationship between the provision and Rule 54(d). GRC does not argue otherwise.

2. Addressing the second question presented, GRC repeatedly states that the issue is merely a factual dispute. *See* GRC Resp. 18, 20, 21, 25, 28. GRC is incorrect. The Tenth Circuit decision addressed a legal question central to the functioning of the FDCPA: whether, as defined in the statute, a "communication" in connection with the collection of a debt must indicate that it concerns a debt to fall within the scope of the statutory prohibition on debt collectors' communications with third parties, such as employers. The facts relied upon by the Tenth Circuit, and stressed by GRC, are relevant only if the answer to that question of pure statutory interpretation is yes. And that answer, adopted by the Tenth Circuit in this case, departs from the view of the vast majority of district courts and the federal regulators and guts key provisions of the statute. Simply assuming that the Tenth Circuit correctly construed the statutory definition, GRC fails to address, or even recognize, the legal issue presented.

The petition (at 19-21) includes a long list of district court cases that read the FDCPA differently than the

Tenth Circuit, including some that expressly reject the theory adopted below and explain its threat to the functioning of the statute. The petition also acknowledges that a small minority of cases interpret "communication" differently. *See* Pet. 22 n.6. GRC discusses a handful of these cases, finding factual distinctions between them and this case. For example, GRC (at 22) discusses *West v. Nationwide Credit, Inc.*, 998 F. Supp. at 642, 644 (W.D.N.C. 1998), which held that a debt collector had "communicated" with a third-party within the meaning of the FDCPA by calling the plaintiff's neighbor to ask the neighbor to ask the plaintiff to return the call to discuss a "very important" matter, although the debt collector did not tell the neighbor that the matter concerned a debt. GRC uses *West* as an example to show that many cases cited in the petition involve telephone calls, not written documents. GRC does not explain why this distinction is pertinent here, and it is not. If a "communication" must indicate that it concerns a debt, *West*—like the others cited in the petition (at 20)—should have come out differently. *See also, e.g., Ramirez v. Apex Fin. Mgmt.*, 567 F. Supp. 2d 1035, 1040-41 (N.D. Ill. 2008) (debt collector's 21 voicemail messages asking only for a return call were "communications").

GRC is correct that every case presents a different set of facts. But each decision applies the court's understanding of the law to those facts. It is beyond dispute that the Tenth Circuit's understanding of the FDCPA runs counter to the vast majority of prior decisions.

Glaringly, GRC does not cite even once the FDCPA provision that restricts communications with a consumer's employer to requests for "location information," § 1692b. The petition explains, and GRC agrees, that GRC's fax to Ms. Marx's employer was sent in connection with collection

of a debt, *see* GRC Resp. 3 (stating that fax was sent to determine "eligibility for wage garnishment"), and asked for information *in addition to* permitted "location information," as that term is defined in the FDCPA, § 1692a(7); *see id.* at 4 (listing information sought). As explained at length in the petition, the Tenth Circuit's interpretation of "communication" effectively eliminates the limitations built into the location information provision and renders its subsections internally contradictory. Pet. 16-17. GRC's silence on the point concedes it.

Likewise, the petition describes some of the ways in which the decision below undermines other important protections of the FDCPA. Pet. 17-19. As to these provisions too, GRC is silent. The closest it comes to a response is to say that, in some situations, consumers may be protected by provisions that do not turn on the statutory definition of "communication." GRC Resp. 27. Those other provisions, however, are aimed at deterring different types of abusive conduct, such as harassment and deception. *See* 15 U.S.C. § 1692d (prohibiting harassment and abuse), § 1692e (prohibiting false and misleading representations). While important, those provisions do not address many of the specific harms that Congress sought to address in the FDCPA by imposing a variety of limitations on communications. (Moreover, several provisions within § 1692d and § 1692e turn on the definition of "communication.") In particular, these other provisions do not address the harm to a consumer when a debt collector communicates with the consumer's employer, neighbors, or other third parties in connection with the collection of a debt.

Finally, GRC questions the view that the FDCPA generally prohibits all "contact" with a third party in connection with the collection of a debt, except to the extent permitted by § 1692c(b)'s authorization of efforts to obtain

location information. *See* GRC Resp. 25. Yet that view, in contrast to the decision below, gives meaning to each provision of the statute, without creating the contradictions and inconsistencies that flow from the Tenth Circuit's decision. Moreover, that view reflects the understanding of the majority of courts and of the federal regulators—the Consumer Financial Protection Bureau (CFPB), the Office of the Comptroller of the Currency, and the Federal Reserve Board. All three regulators recognize that § 1692c(b) (barring third-party communications) generally limits "contacts" with third parties, "except as provided in" § 1692b (allowing communications to obtain location information).[3] Indeed, the debt collectors' trade association takes the same view. *See* ACA Int'l, *Guide to the FDCPA* 62-63 (2009-10 ed.) ("only" information debt collector can request from third party is location information), *attached as* Exh. B to CFPB Tenth Cir. Amicus Br.

As the CFPB recently stated in its Annual Report to Congress:

> [T]he [*Marx*] decision unduly limits the Act's general ban on contacting third parties in connec-

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[3] *See* CFPB, *Supervision and Examination Manual* at FDCPA 2-3 (Oct. 2011), *available at* www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf (stating that, with exceptions not pertinent here, debt collector may not "contact" third parties when trying to collect a debt, except that "a debt collector who is unable to locate a consumer may ask a third party for the consumer's" location information); OCC, *Other Consumer Protection Laws and Regulations (Comptroller's Handbook)* at 24 (Aug. 2009), *available at* www.occ.gov/publications/publications-by-type/comptrollers-handbook/other.pdf (same); Federal Reserve Board, *Consumer Compliance Handbook* at FDCPA 2 (Jan. 2006), *available at* www.federalreserve.gov/boarddocs/supmanual/cch/fairdebt.pdf (same).

> tion with debt collection. The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors.

CFPB, *Annual Report 2012, Fair Debt Collection Practices Act* 19, *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. GRC (at 19) dismisses the regulators' views as not worthy of deference. Again, GRC misses the point. The views of the federal regulators are significant because they further illustrate that the decision below not only cuts against the plain language and structure of the FDCPA, but also its accepted construction, thus threatening to undermine the protections of the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

May 2012

AMICUS CURIAE BRIEF

No. 11-1175

In The Supreme Court of the United States

OLIVEA MARX,

Petitioner.

v.

GENERAL REVENUE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Richard J. Rubin
Counsel of Record
ATTORNEY AT LAW
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418
DickRubin@cs.com

Joanne S. Faulkner
ATTORNEY AT LAW
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395
jsfaulkner@snet.net

Robert J. Hobbs
NATIONAL CONSUMER LAW CENTER
7 Winthrop Square
Boston, Massachusetts 02110
(617) 542-8010
rhobbs@nclc.org

Counsel for Amicus Curiae

Dated: April 27, 2012

THE LEX GROUP DC • 1825 K Street, N.W. • Suite 103 • Washington, D.C. 20006
(202) 955-0001 • (800) 856-4419 • Fax: (202) 955-0022 • www.thelexgroup.com

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The nonprofit National Consumer Law Center (NCLC) has been working for consumer justice and economic security on behalf of low-income, elderly, and disadvantaged Americans since 1969 through policy analysis and advocacy, publications, litigation, expert witness services, and training. The NCLC is recognized nationally as an authority on consumer credit issues, including fair debt collection, and has drawn on this expertise to provide legal research, analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years.[1]

The NCLC is, among other roles and accomplishments, author of the widely praised eighteen-volume *Consumer Credit and Sales Legal Practice Series*, which the American Bar Association Journal review described as "a monumental undertaking comparable to but more practical than the Restatement of Laws." Shoenberger, Book Review, 69 A.B.A. J. 1518, 1522 (1983). Among the treatises in the Series is the 1,279 page *Fair Debt Collection* (7th Ed. 2011), whose focus includes the Fair Debt Collection Practices Act (FDCPA). This treatise has become an FDCPA standard that has been cited as authoritative by numerous federal courts, including twice by the Court in its most

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[1] Accompanying this brief *amicus curiae* are signed letters wherein the parties have consented to this filing. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

recent FDCPA opinion, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, __ U.S. ___, 130 S. Ct. 1605, 1617, 1621 nn.12, 16 (2010). Undersigned counsel are co-editors of this volume, and NCLC's sole concern is compliance with the FDCPA, faithful application and enforcement of this law, and protection of the consumers for whose benefit Congress adopted it.

The NCLC respectfully presents its Brief *Amicus Curiae* to urge the Court to grant review of the opinion below to correct its deleterious effects on FDCPA compliance and enforcement.

SUMMARY OF ARGUMENT

Notwithstanding Congress's clearly stated intentions and efforts, non-compliance with the FDCPA unfortunately remains commonplace even now, 35 years after the FDCPA was enacted. Indeed, the Federal Trade Commission (FTC) "continues to receive more complaints about the debt collection industry than any other specific industry." Consumer Financial Protection Bureau (CFPB) Annual Report 2012, Fair Debt Collection Practices Act, p. 6, available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf (hereinafter "CFPB 2012 Congressional Report").

Among the FDCPA's most significant protections are the privacy and employment security safeguards at issue here that set explicit controls and limitations on debt collector contacts with the consumer's employer and other third parties. A

consensus among everyone concerned – federal regulators, commentators, treatises, and consumer advocates as well as the collection industry itself – has recognized that the precise type of employer contact that occurred here is subject to the FDCPA's specific and exacting regulation. The decision below has now thrown that consensus into chaos by holding that such third party contacts are often not subject to the FDCPA. The majority opinion's exclusion from the statutory definition of "communication" of a fax sent by a debt collector to the consumer's employer because it did not indicate to the recipient that it was related to debt collection not only ignores and nullifies the plain language of the FDCPA, but creates confusion and uncertainty in an area where clarity and precision are required to promote industry compliance with the FDCPA's otherwise straightforward privacy regimen.

The opinion below actually re-wrote the FDCPA's definition of "communication." Congress used this defined term at several critical points throughout the statute, not just as the linchpin of the third party contact rule. Thus, in addition to wreaking havoc on the third party communication section, the opinion below has the unintended consequence of undermining FDCPA compliance regarding several other related and unrelated additional provisions. *Amicus* asks that the Court grant the writ of certiorari to limit the extraordinary damage that the opinion below threatens and reinstate the uniformity that has been the hallmark of the FDCPA in this area for the past 35 years.

The second ruling below also warrants the Court's review. Creating a conflict with the Ninth Circuit, the lower court held that the FDCPA's private enforcement cost-shifting restriction that permits an award of costs against the losing plaintiff only if that consumer has initiated the litigation "in bad faith and for the purpose of harassment" does not displace the general standard of Rule 54(d). The Court should grant the writ of certiorari to resolve the resulting split with the opposite holding from the Ninth Circuit on this very issue.

ARGUMENT

I. The Opinion Below Ignores and Nullifies Multiple FDCPA Provisions to Allow the Collector to Contact the Consumer's Employer

The CFPB highlighted this case in its 2012 report to Congress. *See* CFPB 2012 Congressional Report, pp. 18-19. The CFPB confirmed that, contrary to the opinion below, "The Act's structure reveals that, in balancing risks to consumers against debt collectors' interests, Congress chose generally to bar third-party contacts except those necessary to locate debtors." The CFPB explained that the majority "adopt[ed] an interpretation that conflicts with the statute's text, purposes, and accepted understanding."[2] *Id.*

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[2] The petition for certiorari collects at page 6, n.1, the unanimous and consistent positions of the entire federal enforcement community as well as of the collection industry itself that confirm the CFPB's assertion that the opinion below "conflicts with the statute's ... accepted understanding."

Amicus joins the CFPB in its critique. Congress enacted the FDCPA because existing laws were not adequately protecting consumers against abusive practices of collection agencies. 15 U.S.C. § 1692b. Congress found that among the major detrimental consequences resulting from these abusive practices were "invasions of individual privacy" and "the loss of jobs." 15 U.S.C. § 1692a. Accordingly, Congress carefully stated in 15 U.S.C. § 1692c the following ban on all but its specifically enumerated contacts by debt collectors with all third parties:

> **(b) Communication with third parties**
>
> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. (Emphasis added).

Section 1692b in turn establishes the rules applicable here that permit a narrow category of third party contacts "for the purpose of acquiring location information about the consumer." Sections

1692a(2) and (7) contain the following two key definitions:

> **(2)** The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
>
> and
>
> **(7)** The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

The essential holding below is that the fax here was not a "communication" because it did not "indicate to the recipient that the message relates to the collection of a debt." Pet. App. 4a. This holding is at odds with Congress's § 1692a(2) definition of "communication" which contains no such requirement regarding the impact on or the understanding of the recipient and instead focuses only on the type of information conveyed, "directly or indirectly." Here, the fax conveyed information about the debt both directly and indirectly, including core information identifying the debt collector, the creditor, and the account ID number. Nothing stated by Congress in the FDCPA supports the decision below to engraft the additional element that a qualifying "communication" must be recognized by the recipient as debt collection-related.

In fact, the opinion below also eviscerates 15 U.S.C. § 1692e(11), which insures that consumers –

in contrast to third parties[3] – are informed that a collection "communication" is from a debt collector in order to prevent the deceptive and abusive ruse of hiding that crucial fact. *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142 (9th Cir. 1998); *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009). A requirement that the recipient of a putative "communication" must be able to recognize it as debt collection-related renders § 1692e(11) useless. Application of the lower court's alteration of the § 1692a(2) definition of "communication" to § 1692e(11) confirms the CFPB's view that this holding "conflicts with the statute's text, purposes, and accepted understanding."

Furthermore, the opinion below permits collectors to contact third party employers to ask for information separate from and in addition to the "location information" as defined in § 1692a(7) and without regard to the restrictions contained in §§ 1692b, 1692c(b), and 1692c(d). By limiting the § 1692(a)(2) definition of "communication" and thereby eliminating the applicability of §§ 1692a(7), 1692b, 1692c(b), and 1692c(d) in many circumstances, the court below necessarily reached an incorrect conclusion. The opinion below effectively nullifies all or part of each of these five provisions.

Tampering with such a key statutory definition can only have the ripple effect to change the meaning and utility of other FDCPA applications triggered by this defined term: §§ 1692c(a), 1692c(c), 1692d(6), 1692e(3), 1692e(8), 1692e(9), 1692e(11),

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[3] *See* 15 U.S.C. §§ 1692(b)(2) and 1692(d)(6)

1692f(5), 1692f(7), 1692f(8), 1692g(a), 1692g(b), 1692g(d), 1692g(e), and 1692p(a)(2)(v). For example, a letter from a debt collector to the consumer stating simply, "Please call Mr. Smith at 1-800-123-4567," is not a "communication" under the majority opinion's misreading of the definition since the consumer would not know that the letter is debt collection-related – even though debt collection was its sole purpose. Therefore, that letter could never be "the initial communication in connection with the collection of any debt" that requires collectors to comply with the debt validation procedures of § 1692g that Congress highlighted as a "significant feature" of the FDCPA. S. Rep. 95-382, at 4 (1977), reprinted at 1977 U.S.C.C.A.N. 1695, 1699; *see, e.g., Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 89-90 (2d Cir. 2008). Similarly, that same collection letter could be sent without consequence to a consumer known to be represented by counsel notwithstanding the explicit prohibition of § 1692c(a)(2). Just as such a letter or a telephone message with the same content renders § 1692e(11) useless under the opinion below, as discussed above, the lower court's narrow reading of the definition eliminates or compromises each of the FDCPA sections listed above that rely on a "communication" as its activating element.

The opinion below contradicts a large number of district court opinions and the views of the responsible regulatory agencies. The Court has long admonished that "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme.... At the very least, ...caution requires attentiveness to the

views of the administrative entity appointed to apply and enforce a statute." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (Truth in Lending Act). *Amicus* urges the Court to grant review to restore the prevailing uniform understanding and application of these provisions necessary to foster orderly and comprehensive FDCPA compliance practices.

II. The Lower Court's Allowance of the Assessment of Costs Against Unsuccessful FDCPA Plaintiffs Other Than as a Sanction Creates a Split Within the Circuits and Conflicts With Congress's Contrary Determination to Encourage Private Attorneys General Litigation

Congress recognized the crucial role that consumers play in enforcing the FDCPA when it adopted the private attorney general model as its primary enforcement mechanism.[4] No one has more of a stake in their own privacy and peace of mind or is as motivated to combat abusive debt collection practices as the individual consumers who are the objects of offending collection activities. While the CFPB, FTC, and other public enforcement bodies deal as best they can with systemic issues (§ 1692*l*), Congress has not funded the army of regulators that would be necessary to scrutinize the collection efforts that currently target the "30 million individuals, or

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[4] *See* S. Rep. 95-382, *supra*, at 5, 1977 U.S.C.C.A.N. at 1699 ("The Committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance").

14 percent of American adults," who annually are "subject to the collection process." CFPB 2012 Congressional Report, p. 4. Congress gave that role to each of these individuals whose tranquility and well-being hang in the balance.

In *Jerman* the Court reaffirmed this role that Congress assigned to ordinary consumers when it acknowledged "the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman*, 130 S. Ct. at 1624. Congress expressed its preference for private enforcement in at least two provisions of the FDCPA. First, it established a system of "strict liability"[5] that imposes § 1692k(a)(2) statutory damages for any violation[6] subject only to the three-prong bona fide error defense applicable to clerical errors and the like. *Jerman*, 130 S. Ct. at 1611-15. Second, § 1692k(a)(3), the FDCPA's cost-shifting provision, creates the dual system that mandates an award of reasonable attorney's fees and costs to the prevailing consumer, *see, e.g., Tolentino v. Friedman*, 46 F.3d 645, 651-52 (7th Cir. 1995), while permitting such an award to the prevailing debt collector only upon a

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[5] *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011); *Ellis v. Solomon and Solomon, P.C.*, 591 F.3d 130, 135 (2d Cir. 2010); *Ruth v. Triumph Partnerships*, 577 F.3d 790, 805 (7th Cir. 2009); *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008); *Picht v. John R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001).

[6] *See, e.g., Scrimgeour v. Internal Revenue*, 149 F.3d 318, 328 n.11 (4th Cir. 1998) ("In order to encourage...'private attorneys general'...Congress enacted the statutory damages provision to ensure that ... meritorious cases...would not walk away from the courthouse empty-handed for failure of proving damages.")

finding that "the action...was brought in bad faith and for the purpose of harassment."

As fully addressed in the petition for certiorari and by the dissent below, the lower court's allowance of an award of costs to the prevailing debt collector unrestricted by the "bad faith and for the purpose of harassment" standard is contrary to the plain language of the FDCPA, as held by the Ninth Circuit in *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699 (9th Cir. 2010), the Circuit opinion with which the decision below conflicts. The statutory limitation on an award of costs to the prevailing defendant reassures the consumer, already vulnerable by reason of being in debt and unable to afford to retain an attorney without the FDCPA's fee-shifting feature, that the risk lies not with losing, but solely with bringing an action in bad faith and for purpose of harassment. In addition, it is significant that any such sanction pursuant to this "bad faith and for the purpose of harassment" standard is available only against the consumer herself and not her attorney. *Hyde v. Midland Credit Management, Inc.*, 567 F.3d 1137 (9th Cir. 2009). Thus, the imposition here of costs on Ms. Marx is not simply contrary to the FDCPA, but can only "chill private suits under the statutory right of action," just as the Court cautioned against in *Jerman*. 130 S. Ct. at 1624.

Year after year, debt collectors are the industry that generates the most consumer complaints to the FTC. In addition, complaints about debt collectors have skyrocketed from 13,962

in 2000[7] to 142,743 in 2011,[8] an astounding increase of over 1,000%. These statistics emphasize that this is not the time to chill private FDCPA enforcement, yet the opinion below does exactly that.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

/s/ Richard J. Rubin
Richard J. Rubin
(Counsel of Record)
1300 Canyon Road
Santa Fe, NM 87501
(505) 983-4418
DickRubin@cs.com

Joanne S. Faulkner
123 Avon Street
New Haven, CT 06511
(203) 772-0395
jsfaulkner@snet.net

Robert J. Hobbs
National Consumer Law Center
7 Winthrop Square
Boston, MA 02110
(617) 542-8010
rhobbs@nclc.org

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[7] *See* FTC Annual Report: Fair Debt Collection Practices Act, March 2001, p. 4 and footnote 4, available at http://www.ftc.gov/os/2001/03/fdcpaar2000.htm#N_4_.

[8] *See* CFPB 2012 Congressional Report, p. 6.

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-1175

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

ALLISON M. ZIEVE
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel of Record
for Petitioner

LISA BLATT
Arnold & Porter LLP
555 12th Street NW
Washington, DC 20004
(202) 942-5842
Lisa.Blatt@aporter.com

Counsel of Record
for Respondent

Petition for Certiorari Filed: March 23, 2012
Certiorari Granted: May 29, 2012

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Offer of Judgment Pursuant to Fed. R. Civ. P. 68, dated November 4, 2008, filed June 18, 2010, as Exhibit A to Response to Motion to Alter Judgment. 34

Bill of costs, filed June 29, 2010. 37

The following opinion, orders, and judgment have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for Certiorari:

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U.S. District Court
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:08-cv-02243-RPM-CBS

Marx v. General Revenue Corporation
Date Filed: 10/15/2008
Assigned to: Judge Richard P. Matsch
Date Terminated: 05/17/2010
Referred to: Magistrate Judge Craig B. Shaffer
Jury Demand: None
Case in other court: USCA, 10-01363
Nature of Suit: 480 Consumer Credit
Cause: 15:1692 Fair Debt Collection Act
Jurisdiction: Federal Question

[List of parties and counsel omitted in printing]

Date Filed	#	Docket Text
10/15/2008	1	COMPLAINT and Jury Demand against General Revenue Corporation (Filing fee $350, Receipt Number COX013709) Summons issued, filed by Olivea Marx. (Attachments: #1 Civil Cover Sheet, #2 Receipt)(llk,) (Entered: 10/16/2008)

* * * * *

11/05/2008	5	ANSWER to 1 Complaint by General Revenue Corporation. (Wienczkowski, Steven) (Entered: 11/05/2008)

* * * * *

03/05/2009	22	AMENDED COMPLAINT against Kevin Cobb, General Revenue Corporation, filed by Olivea Marx. (Attachments: #1 Exhibit A)(jjh,) (Entered: 03/06/2009)
03/19/2009	23	ANSWER to 22 Amended Complaint by General Revenue Corporation, Kevin Cobb. (Wienczkowski, Steven) (Entered: 03/19/2009)

* * * * *

11/02/2009	52	RECOMMENDATION of United States Magistrate Judge. It is Recommended that the Plaintiff's Motion for Partial Summary Judgment as to Liability 28 be Denied by Magistrate Judge Craig B. Shaffer on 11/02/09. (jjh,) (Entered: 11/02/2009)
12/04/2009	53	ORDER Denying Plaintiff's 28 Motion for Partial Summary Judgment pursuant to 52 Report and Recommendations, signed by Judge

Richard P. Matsch on 12/4/2009. (rpmcd) (Entered: 12/04/2009)

* * * * *

05/17/2010 72 Minute Entry - Courtroom Minutes for Bench Trial held on 5/17/2010 before Judge Richard P. Matsch. ORDERED: Plaintiff failed to prove any violations of the statute or regulations. Judgment to enter for defendant. (Exhibits and Depositions returned to counsel). (Reporter FTR - K. Terasaki) (rpmcd) (Entered: 05/18/2010

* * * * *

05/17/2010 74 JUDGMENT. Ordered that judgment is entered in favor of defendant General Revenue Corporation and against plaintiff Olivea Marx. Ordered that defendant General Revenue Corporation shall have its costs by the filing of a Bill of Costs with the Clerk of the Court within 14 days of the entry of judgment. Ordered that the Complaint, Amended Complaint and this civil action are dismissed by Deputy Clerk on 05/17/2010. (jjh,) (Entered: 05/18/2010)

05/28/2010	75	Proposed Bill of Costs by Defendant General Revenue Corporation. (Wienczkowski, Steven) (Entered 05/28/2010)

* * * * *

06/08/2010	77	MOTION to Alter Judgment re 74 Clerk's Judgment, *Motion to Alter / Amend the Judgment Pursuant to Fed.R.Civ.P. 59(e)* by Plaintiff Olivea Marx. (Attachments: # 1 Exhibit 1 - Rouse v. Law Offices of Rory Clark, (9th Cir. 2010))(Larson, David) (Entered: 06/08/2010)
06/18/2010	78	RESPONSE to 77 MOTION to Alter Judgment re 74 Clerk's Judgment, Motion to Alter / Amend the Judgment Pursuant to Fed.R.Civ.P. 59(e filed by Defendant General Revenue Corporation. (Attachments: # 1 Exhibit)(Wienczkowski, Steven) Modified on 6/21/2010 to delete duplication (jjh,). (Entered: 06/18/2010)
06/29/2010	79	Costs Taxed in amount of $ 4,543.03 against Plaintiff (jjh,) (Entered: 06/29/2010)

* * * * *

07/06/2010	81	MOTION for Review *of Taxation of Costs* by Defendant General Revenue Corporation. (Attachments: # 1 Exhibit)(Wienczkowski, Steven) (Entered: 07/06/2010)
07/15/2010	82	ORDER Denying Plaintiff's Motion to Alter/Amend Judgment and Order Denying Defendant's Motion for Review of Taxation of Costs. Ordered that the plaintiff's motion to alter/amend the judgment 77 is denied. Ordered that the defendant's motion for review of taxation of costs 81 is denied by Judge Richard P. Matsch on 07/15/10. (jjh,) (Entered: 07/15/2010)
08/13/2010	83	NOTICE OF APPEAL as to 79 Costs Taxed, 72 Bench Trail - Begun, 74 Clerk's Judgment, 82 Order on Motion to Alter Judgment,, Order on Motion for Review, by Plaintiff Olivea Marx (Larson, David) (Entered: 08/13/2010)

[Subsequent entries omitted]

General Docket
Tenth Circuit Court of Appeals

Court of Appeals Docket #: 10-1363
Docketed: 08/17/2010
Nature of suit : 3480 Consumer Credit
Termed: 12/21/2011
Marx v. General Revenue Corporation
Appeal from: United States District Court for the District of Colorado
Fee Status: Fee Paid

[Case type information, originating court information, and panel assignment omitted in printing]

[Caption, parties, and counsel omitted in printing]

08/17/2010	Civil case docketed. Preliminary record filed. DATE RECEIVED: 08/16/2010. Docketing statement and transcript order form due 08/31/2010 for Olivea Marx. Notice of appearance due on 08/31/2010 for General Revenue Corporation and Olivea Marx.

* * * * *

09/12/2011	Case argued by David Larson for the Appellant; Steven Wienczkowski for the Appellee; and submitted to Judges Kelly, Lucero and Gilman.
12/21/2011	Affirmed. Terminated on the merits after oral hearing. Written, signed, published. Judges Kelly (authoring judge), Lucero (dissenting), and Gilman. Mandate to issue.
12/21/2011	Judgment for opinion filed.

* * * * *

01/19/2012 Petition for rehearing, for rehearing en banc filed by Olivea Marx. Original and 18 copies. Served on 01/19/2012. Manner of Service: ECF/NDA. DML

* * * * *

01/26/2012 Amicus Curiae brief on rehearing filed by Consumer Financial Protection Bureau. 18 paper copies to be provided to the court. Served on 01/26/2012. Manner of Service: ECF/NDA.

* * * * * *

01/30/2012 Order filed by Judges Kelly, Lucero and Gilman denying petition for rehearing en banc filed by Appellant Olivea Marx.

02/07/2012 Mandate issued.

[Subsequent entries omitted]

[Filed October 15, 2008]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil action No.:

OLIVEA MARX,

Plaintiff,

v.

GENERAL REVENUE CORPORATION, an Ohio Corporation,

Defendant.

COMPLAINT AND JURY DEMAND

JURISDICTION

1. Jurisdiction of this Court arises under 28 U.S.C. § 1331 and 15 U.S.C. 1692k(d).

2. This action arises out of the Defendant's violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (hereinafter the "FDCPA").

VENUE

3. Venue is proper in this District because the acts and transactions occurred here, the Plaintiff resides here, and the Defendant transacts business here.

PARTIES

4. Plaintiff, Olivea Marx, is a natural person who resides in the City of Fort Collins, County of Larimer, State of Colorado.

5. The Plaintiff is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

6. Defendant, General Revenue Corporation, is an Ohio corporation operating from an address at 11501 Northlake Drive, Cincinnati, Ohio, 45249.

7. The Defendant is a "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

8. The Defendant is licensed as a collection agency by the state of Colorado.

9. The principal purpose of the Defendant is the collection of debts using the mails and telephone.

10. The Defendant regularly attempts to collect debts alleged to be due another.

FACTUAL ALLEGATIONS

11. Sometime before December 2007 the Plaintiff allegedly incurred a financial obligation that was primarily for personal, family or household purposes namely an amount due and owing on a personal account (hereinafter the "Account").

12. The Account is a "debt" as that term is defined by 15 U.S.C. § 1692a(5).

13. The Account went into default with the original creditor.

14. Sometime after the Account went into default the Account was placed or otherwise transferred to the Defendant for collection from the Plaintiff.

15. In the year prior to the filing of the instant action the Plaintiff received telephone calls and voicemail messages from the Defendant and / or representatives, employees and / or agents of the Defendant who were attempting to collect the Account. The Plaintiff called the Defendant in response to the telephone calls and voicemail messages. These telephone calls and voicemail messages each individually constituted a "communication" as defined by FDCPA § 1692a(2).

16. During the telephone calls the Defendant and / or representatives, employees and / or agents of the Defendant attempting to collect the Account repeatedly falsely threatened to garnish up to 50 percent (50%) of the Plaintiff's wages.

17. During the telephone calls the Defendant and / or representatives, employees and / or agents of the Defendant attempting to collect the Account repeatedly falsely threatened to take the money owed on the Account out of the Plaintiff's bank account.

18. In the year prior to the filing of the instant action the Defendant and / or representatives, employees and / or agents of the Defendant repeatedly called the Plaintiff multiple times a day to annoy, abuse and harass the Plaintiff while attempting to collect the Account.

19. The Defendant has not filed any legal action(s) against the Plaintiff.

20. The Defendant has not received any judgment(s) against the Plaintiff.

21. The Defendant has not garnished the Plaintiff's wages.

22. The Defendant has not taken or seized any money out of the Plaintiff's bank account(s).

23. The statements and actions were undertaken by the Defendant and its representatives, employees and / or agents as part of a campaign of abusive and unlawful collection tactics directed at the Plaintiff.

24. The Defendant and its representatives, employees and / or agents statements and actions constitute harassment or abuse and therefore violate FDCPA 1692d preface, d(2), and d(5).

25. The Defendant and its representatives, employees and / or agents statements and actions constitute false and misleading representations and means and violate FDCPA 1692e preface, e(2)(A), e(3), e(4), e(5), e(10) and e(11).

26. The Defendant and its representatives, employees and / or agents statements and actions constitute unfair or unconscionable means to collect or attempt to collect a debt and violate FDCPA 1692f preface.

27. The Defendant's statements and actions as well as that of its representatives, employees and / or agents were attempt to frighten, harass and abuse the Plaintiff into paying the alleged debt.

28. The Defendant's statements and actions as well as that of its representatives, employees and / or agents were willful and intentional violations of the FDCPA.

29. As a consequence of the Defendant's collection activities and communications, the Plaintiff has sustained actual damages.

RESPONDEAT SUPERIOR

30. The representatives and / or collectors at the Defendant were employees of and agents for the Defendant at all times mentioned herein.

31. The representatives and / or collectors at the Defendant were acting within the course and scope of their employment at all times mentioned herein.

32. The representatives and / or collectors at the Defendant were under the direct supervision and control of the Defendant at all times mentioned herein.

33. The actions of the representatives and / or collectors at the Defendant are imputed to their employer, the Defendant.

34. As a direct and proximate result of the aforesaid actions, the Plaintiff has suffered the aforementioned damages.

COUNT I, FDCPA VIOLATIONS

35. The previous paragraphs are incorporated into this Count as if set forth in full.

36. The acts and omissions of the Defendant and its representatives, employees and / or agents constitute numerous and multiple violations of the FDCPA, including but not limited to § 1692d preface, d(2), d(5), § 1692e preface, e(2)(A), e(3), e(4), e(5), e(10), e(11) and § 1692f preface.

37. The Defendant's violations are multiple, willful and intentional.

38. Pursuant to FDCPA section 1692k the Plaintiff is entitled to actual damages, statutory damages up to $1,000.00, reasonable attorney's fees and costs.

JURY TRIAL DEMAND

The Plaintiff is entitled to and hereby demands a trial by jury. US Const. amend. 7., Fed. R. Civ. Pro. 38.

PRAYER

WHEREFORE, the Plaintiff prays that the Court grants the following:

1. Actual damages under 15 U.S.C. § 1692k(a)(1).
2. Statutory damages under 15 U.S.C. § 1692k(a)(2)(A).
3. Reasonable attorneys fees and costs pursuant to 15 U.S.C. § 1692k(a)(3).
4. Such other and further relief as the Court deems just and proper.

[signature block omitted]

[Filed March 5, 2009]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No.: 08-cv-02243-RPM-CBS

OLIVEA Marx,

Plaintiff,

v.

GENERAL REVENUE CORPORATION, an Ohio corporation, and, KEVIN COBB,

Defendants.

FIRST AMENDED COMPLAINT AND JURY DEMAND

JURISDICTION

1. Jurisdiction of this Court arises under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d).

2. This action arises out of the Defendants' violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (hereinafter the "FDCPA").

VENUE

3. Venue is proper in this District because the acts and transactions occurred here, the Plaintiff resides here, and the Defendants transact business here.

PARTIES

4. Plaintiff, Olivea Marx, is a natural person who resides in the City of Fort Collins, County of Larimer, State of Colorado.

5. The Plaintiff is a "consumer" as that term is defined by 15 U.S.C. § 1692a(3).

6. Defendant General Revenue Corporation (hereinafter "GRC") is an Ohio corporation operating from an address at 11501 Northlake Drive, Cincinnati, Ohio, 45249.

7. Defendant General Revenue Corporation is a "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

8. Defendant General Revenue Corporation is licensed as a collection agency by the state of Colorado.

9. The principal purpose of Defendant General Revenue Corporation is the collection of debts using the mails and telephone.

10. Defendant Kevin Cobb (hereinafter "Cobb") is a natural person and was a representative, employee and / or agent of Defendant General Revenue Corporation at all times mentioned herein.

11. Defendant Cobb is a "debt collector" as that term is defined by 15 U.S.C. § 1692a(6).

12. Defendant Cobb is licensed as a debt collector by the state of Minnesota, debt collector license number 40097784.

13. Defendant Cobb regularly attempts to collect debts alleged to be due another.

FACTUAL ALLEGATIONS

14. Sometime before December 2007 the Plaintiff allegedly incurred a financial obligation that was primarily for personal, family or household purposes namely an amount due and owing on a personal account (hereinafter the "Account").

15. The Account is a "debt" as that term is defined by 15 U.S.C. § 1692a(5).

16. The Account went into default with the original creditor.

17. Sometime after the Account went into default the Account was placed or otherwise transferred to Defendant GRC for collection from the Plaintiff.

18. In the year prior to the filing of the instant action the Plaintiff received telephone calls and voicemail messages from Defendant GRC and / or representatives, employees and / or agents of Defendant GRC including Defendant Cobb who were attempting to collect the Account. The Plaintiff called Defendant GRC in response to the telephone calls and voicemail messages. These telephone calls and voicemail messages each individually constituted a "communication" as defined by FDCPA § 1692a(2).

19. During the telephone calls Defendant GRC and / or representatives, employees and / or agents of Defendant GRC attempting to collect the Account

falsely threatened to garnish up to 50 percent (50%) of the Plaintiff's wages.

20. During the telephone calls Defendant GRC and / or representatives, employees and / or agents of Defendant GRC attempting to collect the Account falsely threatened to take the money owed on the Account out of the Plaintiff's bank account.

21. In the year prior to the filing of the instant action Defendant GRC and / or representatives, employees and / or agents of the Defendant GRC repeatedly called the Plaintiff multiple times a day to annoy, abuse and harass the Plaintiff while attempting to collect the Account.

22. On or about September 23, 2008, Defendant Cobb, a representative, employee and / or agent of Defendant GRC sent a facsimile document to the Plaintiff's place of employment while attempting to collect the Account. A copy of the facsimile document is attached as Exhibit A.

23. The facsimile document constituted a "communication" as defined by FDCPA § 1692a(2).

24. The Plaintiff never authorized Defendant GRC or any representative, employee and / or agent of Defendant GRC including Defendant Cobb to send the facsimile document to her place of employment.

25. The facsimile document was sent after Whitney Cooke, a representative, employee and / or agent of Defendant GRC had spoken with the Plaintiff about the Account on or about September 20, 2008.

26. The facsimile document requested that the Plaintiff's employer provide the following employment information: "Employer Address, Employment Status, Date of Hire, Corporate Payroll Address, Full-time or Part-time and Position/Title".

27. The definition for "location information" under FDCPA 1692a(7) "means a consumer's place of abode and his telephone number at such place, or his place of employment."

28. The information requested in the facsimile document exceeds the information allowed under FDCPA 1692a(7).

29. The Defendants' did not have the prior consent of the Plaintiff given directly to the Defendants to send the facsimile document to the Plaintiff's place of employment on or about September 23, 2008.

30. The Defendants' did not have the express permission of a court of competent jurisdiction to send the facsimile document to the Plaintiff's place of employment on or about September 23, 2008.

31. The Defendants' were not acting as reasonably necessary to effectuate a postjudgment judicial remedy when they sent the facsimile document to the Plaintiff's place of employment on or about September 23, 2008.

32. The facsimile document sent to the Plaintiff's place of employment on or about September 23, 2008 by the Defendants was a communication in connection with the collection of the Plaintiff's debt.

33. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was not sent to the Plaintiff.

34. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was sent to "Center Partners Attn: Nichole".

35. The facsimile document send to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was not sent to the Plaintiff's attorney.

36. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was not sent to a consumer reporting agency.

37. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was not sent to the "creditor" in this case as defined bye FDCPA 1692a(4).

38. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was not sent to the attorney of the "creditor" in this case as defined by FDCPA 1692a(4).

39. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 was not sent to the attorney of the Defendants.

40. The facsimile document sent to the Plaintiff's place of employment by the Defendants on or about September 23, 2008 is a form document that is regularly used by Defendant GRC and its representatives, employees and / or agents including Defendant Cobb to attempt to collect debts from individuals that they are collecting

from and is regularly sent to the places of employment of the individuals that the Defendant GRC and its representatives, employees and / or agents including Defendant Cobb are attempting to collect debts from without the express permission of the individual that they are attempting to collect fror .

41. The Defendants have not filed any legal action(s) against the Plaintiff.

42. The Defendants have not received any judgment(s) against the Plaintiff.

43. The Defendants have not garnished the Plaintiff's wages.

44. The Defendants have not taken or seized any money out of the Plaintiff's bank account(s).

45. The statements and actions were undertaken by the Defendant GRC and its representatives, employees and / or agents including Defendant Cobb as part of a campaign of abusive and unlawful collection tactics directed at the Plaintiff.

46. Defendant GRC and its representatives, employees and / or agents including Defendant Cobb's statements and actions constitute illegal communication in connection with debt collection and therefore violate FDCPA 1692c(b).

47. Defendant GRC and its representatives, employees and / or agents including Defendant Cobb's statements and actions constitute harassment or abuse and therefore violate FDCPA 1692d preface, d(2) and d(5).

48. Defendant GRC and its representatives, employees and / or agents statements and actions constitute false and misleading representations and means and violate FDCPA 1692e preface[,] e(2)(A), e(3), e(4), e(5), e(10) and e(11).

49. Defendant GRC and its representatives, employees and / or agents including Defendant Cobb's statements and actions constitute unfair or unconscionable means to collect or attempt to collect a debt and violate FDCPA 1692f preface.

50. Defendant GRC's statements and actions as well as that of its representatives, employees and / or agents including Defendant Cobb were attempts to frighten, harass and abuse the Plaintiff into paying the alleged debt.

51. Defendant GRC's statements and actions as well as that of its representatives, employees and / or agents were willful and intentional violations of the FDCPA.

52. As a consequence of the Defendants' collection activities and communications, the Plaintiff has sustained actual damages.

RESPONDEAT SUPERIOR

53. The representatives and / or collectors at Defendant GRC including Defendant Cobb were employees of and agents for Defendant GRC at all times mentioned herein.

54. The representatives and / or collectors at Defendant GRC including Defendant Cobb were acting within the

course and scope of their employment at all times mentioned herein.

55. The representatives and / or collectors at Defendant GRC including Defendant Cobb were under the direct supervision and control of Defendant GRC at all times mentioned herein.

56. The actions of the representatives and / or collectors at Defendant GRC including Defendant Cobb are imputed to their employer, Defendant GRC.

57. As a direct and proximate result of the aforesaid actions, the Plaintiff has suffered the aforementioned damages.

COUNT I, FDCPA VIOLATIONS

58. The previous paragraphs are incorporated into this Count as if set forth in full.

59. The acts and omissions of Defendant GRC and its representatives, employees and / or agents including Defendant Cobb constitute numerous and multiple violations of the FDCPA, including but not limited to § 1692c(b), § 1692d preface, d(2), d(5), § 1692e preface, e(2)(A), e(3), e(4), e(5), e(10), e(11) and § 1692f preface.

60. The Defendants' violations are multiple, willful and intentional.

61. Pursuant to FDCPA section 1692k the Plaintiff is entitled to actual damages, statutory damages of $1,000.00, reasonable attorney's fees and costs.

JURY TRIAL DEMAND

The Plaintiff is entitled to and hereby demands a trial by jury. US Const. amend. 7., Fed. R. Civ. Pro. 38.

PRAYER

WHEREFORE, the Plaintiff prays that the Court grants the following:

1. Actual damages under 15 U.S.C. § 1692k(a)(1).
2. Statutory damages under 15 U.S.C. § 1692k(a)(2)(A).
3. Reasonable attorneys fees and costs pursuant to 15 U.S.C. § 1692k(a)(3).
4. Such other and further relief as the Court deems just and proper.

[signature block omitted]

SallieMae 9/23/2008 3:54 PM PAGE 1/001 Fax Server

[Logo] General Revenue Corporation [Redaction on exhibit]

PO Box 6137
Indianapolis, IN 46206
1-800-537-0873

DATE: 09/23/2008 ID: [Redaction on exhibit]

Fax No. to verify Employment: (970) 282.9225

Name of company: CENTER PARTNERS
ATTN: NICHOLE

EMPLOYMENT INFORMATION

We are requesting employment information on **OLIVEA MARX**

SSN: ENDING IN [redacted on exhibit]
Please assist us with any information by calling 1-888-710-6819, or please fill in the information requested below and return to: FAX # 1-866-443-5851

RETURN ADDRESS

GRC
P.O. Box 6138 MC 8306
Indianapolis, IN 46206
FAX No. 317-694-1023

Employer Address: [handwritten information omitted]

Employment Status: [handwritten information omitted]

Exhibit A

Date of Hire: [handwritten information omitted]

Corporate Payroll Address: [handwritten information omitted]

Address line 2 _____

Address line 3 _____

Full-time or Part-time: [handwritten information omitted]

Position/Title: [handwritten information omitted]

[Filed May 17, 2010]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

OLIVEA MARX, Plaintiff,	)	
vs.	)	1:08-cv-02243-RPM-CBS
GENERAL REVENUE CORPORATION, Defendant.	)	

TRIAL TO COURT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE RICHARD P. MATSCH, U.S. District Judge for the District of Colorado, beginning at 8:30 a.m. on the 17th day of May, 2010, in Courtroom A, United States Courthouse, Denver, Colorado.

[Remainder of page 1 - page 226 omitted]

25 THE COURT: So, you know, here are my findings. The

1 [227] stipulated facts that are in the pretrial order, of course I

2 incorporate by reference here, and there is no doubt about

3 jurisdiction and there's no doubt about the applicability of

the Fair Debt Collection Practices Act to this defendant.

This case comes down to the question of the credibility of the testimony of Olivea Marx. If her testimony were to be taken as true in all respects, the defendant would be liable. But I'm not accepting all of her testimony.

The situation here is lamentable. Ms. Marx, in September of 2008, was in a very vulnerable position. The stresses on her at that time were enormous. She's a mother of four children, two living with her, very young children. She apparently has been in a continuing dispute with the father of the children regarding the payment of support. She has a job, but it's at best one that covers her expenses. She's in a rental situation where she's behind in her rent, and subject to possible eviction.

So, she's - - and when she's contacted about this

indebtedness, her understanding is that she didn't have a student loan. I accept all of that testimony, and that she thought she was attending the IBMC, which may be an incorrect title of the school where she was attempting to become trained as a medical assistant in 2002 and '03. And, according to her testimony, which I have no reason not to [228] accept, she thought she was in school on some sort of a grant.

But, not only is this a student loan, it's a large student loan, I mean to somebody in her position, it's very large. So, her response to this -- emotional response to this inquiry and the information that she owes this student loan, as she said, was panic. Now, that's significant in terms of her understanding and recollection of what was actually said when there were communications.

She testified here that she was threatened by

whoever was on the phone, man or woman, with - - well, she didn't say garnishment actually, taking 50 percent of your wages, and that's the critical testimony that I have to determine whether that is to be accepted as she said. I don't accept it.

It isn't that I'm accusing Ms. Marx of being untruthful. I'm sure she remembers it that way. But, I just cannot accept that somebody from the defendant would make that threat. There's also, in her testimony, that there was a suggestion that she get another job, or donate blood. I don't - - nobody was asked about that specifically other than Ms. Marx. That is alarming if that were true, but I'm not accepting it.

So, I don't find a violation on the threatened 50 percent garnishment. I think it is a reasonable inference

[229] that she was told she could have 15 percent of her wages taken, and that that's misinterpreted to be the 50 percent. That's a reasonable - - I think that's a reasonable inference from the evidence.

With respect to the facsimile transmission here, as to whether that's a violation of the law, I find that it is not. When Magistrate Judge Shaffer looked at that, he said it's a factual question and denied the plaintiff's motion for summary judgment on that point. And, it is a factual question and has to be resolved. I didn't hear any testimony from anybody from the plaintiff's employer about what happened when they received that. So, I don't know. It may well be that for reasons unrelated to the lawsuit itself, plaintiff's counsel chose not to call the employer.

But, without testimony from the employer as to what it meant, the question then becomes, for me, what is a

reasonable interpretation. It's a reasonable interpretation that somebody is trying to find out whether this Ms. Marx works there, and the other information that's requested on the facsimile. It is certainly a situation where an experienced employer or Nicole, who I believe the plaintiff said was a secretary in HR, would understand that that might be related to a collection. But, that would assume that she knows that the defendant, by name, is a debt collector.

But, you know, it could also relate to possible [230] seeking other employment. The key question here is what does that ID number say at the top? Does that say to a reasonable person in the employer's position that this is an account we're trying to collect? I don't think so. It's close, but I don't think so.

With respect to the content of the facsimile, and requesting information here about title and when beginning

employment, and so forth, I don't accept the plaintiff's contention that that's a violation of the statute because, as the plaintiff contends, that it's limited to location information, as defined by the statute. I don't accept that argument.

So, the third area here is the harassment, or the multiple phone calls for the purpose of annoy, abuse or harass. There are a number of calls in here, but - - and, again, Ms. Marx testified that there were calls that she didn't answer. But, I don't believe the evidence is sufficient to make a finding that the defendant violated either of those provisions that have been mentioned here, the 1692(d)(5), or the more general harassment, 1692(d).

It is, you know, it is understandable how difficult this time period was for Ms. Marx, and, you know, I think that that has affected her ability to understand and to recall the details about which she has testified, and I don't

[Filed June 18, 2010]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08CV02243-RPM-CBS

OLIVEA MARX,

Plaintiff,

v.

GENERAL REVENUE CORPORATION, an Ohio Corporation,

Defendant.

DEFENDANT'S OFFER OF JUDGMENT
PURSUANT TO FED.R.CIV.P.68

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, General Revenue Corporation, ("GRC") by and through its attorneys Adam L. Plotkin, P.C., hereby offers to allow judgment to be taken against it in favor of Plaintiff Olivea Marx, (the "Plaintiff") as follows:

1) Judgment shall be entered in the total amount of One Thousand Five Hundred Dollars ($1,500.00), as against GRC;

2) In addition, Plaintiff's reasonable costs and reasonable attorney's fees now accrued specifically in connection with the prosecution against GRC of any claims specifically allowing for the recovery of such costs and attorney's fees

accept her testimony in those regards.

[231] So, I find that the plaintiff has failed to prove any violation of the statute or regulations, and judgment will enter for the defendant.

Court's in recess.

(4:22 p.m. - Whereupon, the proceedings were concluded.)

pled in the above-referenced suit are to be added to the judgment as against GRC; said fees and costs shall be as are agreed to between counsel for the parties, or if they are unable to agree, as determined by the Court upon motion.

3) The judgment entered in accordance with this Offer of Judgment is to be in total settlement of any and all claims by Plaintiff Olivea Marx against GRC, all of its allied, affiliated, parent and associated companies and their respective shareholders, officers, directors, agents, employees, legal representatives, successors and assigns, and said judgment shall have no effect whatsoever except in settlement of those claims; and

4) This Offer of Judgment is made solely for the purposes specified in Rule 68 of the Federal Rules of Civil Procedure, and is not to be construed either as an admission that GRC is liable in this action, or that Plaintiff Olivea Marx has suffered any damage. All liability is denied.

In accordance with Rule 68 of the Federal Rules of Civil Procedure, if this Offer of Judgment is not accepted by Plaintiff Olivea Marx within ten (10) days after service of this Offer of Judgment, this Offer of Judgment shall be deemed withdrawn and any evidence of this Offer of Judgment will be inadmissable except in any proceeding to recover costs.

In accordance with Rule 68 of the Federal Rules of Civil Procedure, if this Offer of Judgment is not accepted by Plaintiff Olivea Marx and any judgment finally obtained by

Plaintiff Olivea Marx is not more favorable than this Offer of Judgment, Plaintiff Olivea Marx must pay all costs incurred by GRC after making of this Offer of Judgment.

Dated: November 4th, 2008

[signature block omitted]

Exhibit A

an this Offer
ay all costs
f Judgment.

1

Exhibit A

*** NOTE: IT IS YOUR RESPONSIBILITY TO BE AT THIS TIME (ANY TUESDAY, WEDNESDAY, OR THURSDAY AT 8:30, 9:00 OR 9:30 A.M.) BEFORE THE CLERK FOR TAXATION

AO 133
(Rev 01/92)

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUN 29 2010
GREGORY C. LANGHAM
CLERK

BILL OF COSTS

United States District Court	DISTRICT: DISTRICT OF COLORADO
OLIVEA MARX v GENERAL REVENUE CORPORATION	DOCKET NO: 08-CV-02243-RPM-CBS MAGISTRATE CASE NO.

Judgment having been entered in the above entitled action on MAY 17, 2010 against PLAINTIFF

Date

the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$
Fees for service of summons and complaint	$ 210.34
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	$ 1,959.05 Schedule A
Fees and disbursements for printing	$
Fees for witnesses (itemized on reverse side)	$ 320.11 2359.69
Fees for exemplification and copies of papers necessarily obtained for use in the case	$
Docket fees under 28 U.S.C. § 1923	$
Costs incident to taking of depositions	$
Costs as shown on Mandate of Court of Appeals	$
Other costs (Please itemize)	$
	$

Please review and comply with D.C.COLO.LCivR 54.1

(See Notice section on reverse side)

TOTALS $7,329.16 4543.03

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed with postage fully prepaid thereon to:

Signature of Attorney: S/STEVEN J. NIENCZKOWSKI

Print Name: STEVEN J. NIENCZKOWSKI Phone Number: (303) 382-0528

For: GENERAL REVENUE CORPORATION Date: 5/28/10

Name of Claiming Party

Please take notice that I will appear before the Clerk who will tax said costs on the following day and time:	Date and Time: 6/29/10 @ 9:30 June ~~22, 2010 at 9:00 a.m.~~
Costs are hereby taxed in the following amount and included in the judgment:	Amount Taxed: $ 4,543.03

37

*** NOTE: IT IS YOUR RESPONSIBILITY TO SET THE TIME (ANY TUESDAY, WEDNESDAY, OR THURSDAY AT 8:30, 8:00 OR 9:30 A.M.) FOR APPEARANCE BEFORE THE CLERK FOR TAXATION
AO 133
(Rev 03/91)

CLERK OF COURT
GREGORY C. LANGHAM

(BY) DEPUTY CLERK

DATE 6/29/10

WITNESS FEES (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME AND RESIDENCE	ATTENDANCE TOTAL		SUBSISTENCE TOTAL		MILEAGE TOTAL		Total Cost Each Witness
	Days	Cost	Days	Cost	Miles	Cost	
KEVIN COBB, INDIANAPOLIS, IN	1	$40	3	$514	Actually & Necessarily	$514.61	$1,068.61
JEFFREY DEASON, INDIANAPOLIS, IN	1	$40	2	$291	Actually & Necessarily	$380.65	$711.65
RYAN ASHBY, INDIANAPOLIS, IN	1	$40	3	$514	Actually & Necessarily	$590.40	$1,144.40
ERIC TYRELL, KANSAS CITY, KS	1	$40	1	$68	Actually & Necessarily	$897.40	$1,003.40
KEVIN KERSEN, CINCINNATI, OH	1	$40	3	$514	Actually & Necessarily	$696.85	$1,250.85
		160					$314.63
						TOTAL	$5,279.11

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:
"Sec. 1924. Verification of bill of costs."
"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

2759.63

See also Section 1920 of Title 28 which reads in part as follows:
"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:
Rule 54 (d)
"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action."

D.C.COLO.LCivR 54.1 Taxation of Costs
"Each judgment or the final order shall indicate which party or parties are entitled to costs. A bill of costs must be filed on the form provided by the court within 14 days after entry of the judgment or final order. Costs will be taxed by the clerk or a designated deputy. Prior to appearance before the clerk, counsel for the party seeking costs shall file a written statement that a reasonable effort has been made, in conference with opposing counsel, to resolve disputes regarding costs. If costs are resolved, a stipulation setting forth the amount of costs shall be filed with the court."

SCHEDULE A

Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case

DEPONENT	DATE	AMOUNT
Oliver Marx	March 12, 2009	$1,528.25
Ryan Ashby	February 18, 2009	$514.84
Kevin Cobb	February 18, 2009	$140.31
Jeffrey Deason	February 18, 2009	~~$122.40~~
~~Helicia Range~~	February 18, 2009	~~$125.85~~
~~Whitney Cooke~~	February 18, 2009	~~$120.51~~
~~Brianna Williams~~	February 18, 2009	$108.83
TOTAL		~~$2,669.05~~

2143.40

True and correct copies of the invoices related to the above costs are attached.

SCHEDULE B

Fees for Witnesses-Travel/Mileage

The following Schedule represents the travel expenses (exclusive of hotel and meals) for Defendant's witnesses and corporate representative

Name	Travel from:	Expense
Kevin Cobb	Indianapolis	~~$499.61~~ (round trip Indianapolis to Denver) ~~$50.00~~ (baggage fee)
Jeffrey Deason	Indianapolis	~~$329.65~~ (round trip Indianapolis to Denver) ~~$40.00~~ (baggage fees) $120.00 (taxi to/from DIA)
Ryan Ashby	Indianapolis	~~$469.40~~ (round trip Indianapolis to Denver) $110.00 (transportation to/from DIA)
Eric Tyrell	Kansas City, Kansas	~~$625.70~~ (Kansas City to Denver) $34.00 (travel to/from DIA) ~~$237.70~~ (Denver to Albuquerque)*
Kevin Dreyer	Indianapolis	$386.42 (round trip Indianapolis to Denver-excluding penalty for change fee) $50.00 (baggage fees) ~~$201.93~~ (car rental- to/from airport, including for witness Kevin Cobb)
TOTAL		~~$ 2,894.11~~

(w/ lodge amount < 100 miles roundtrip for individuals within driving distance)

100.00

~~[illegible]~~ 15.63

100.00

130.00

100.00

110.00

100.00

34.00

~~[illegible]~~ 3

814.63

Itinerary, invoices, and receipts are attached, reflecting the travel expenses associated with the foregoing individuals' travel to Denver for the trial. Receipts and itinerary for hotel accommodations are included *only* as documentation that four (4) of these individuals were required to stay one or more nights in Denver. Hotel costs have *not* been included in the total, as such costs are included in the allowable daily subsistence.

*With respect to Mr. Tyrell's travel arrangements, Defendant was required to book a flight to Albuquerque instead of a return flight to Kansas City as Mr. Tyrell had another court appearance on Tuesday, May 18, 2010.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-1175

IN THE
Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

July 2012

Library of Congress
Law Library

QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA) provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Federal Rule of Civil Procedure 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

The question presented is whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not "brought in bad faith and for the purpose of harassment."

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 668 F.3d 1174, and reproduced in the petition appendix at 1a. The judgment of the United States District Court for the District of Colorado is unreported and is reproduced in the petition appendix at 30a. The district court's order denying post-judgment motions of both parties is unreported. It is available at 2010 WL 2802550, and reproduced in the petition appendix at 28a.

JURISDICTION

The court of appeals entered its judgment on December 21, 2011. On January 30, 2012, the court denied petitioner's timely petition for rehearing or rehearing en banc. The petition for certiorari was filed on March 23, 2012, and granted on May 29, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

Section 813 of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692k, entitled "Civil liability," provides in relevant part:

> (a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure; [or]

> (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; . . . and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

Federal Rule of Civil Procedure 54(d)(1), entitled "Costs other than Attorney's Fees," provides, in relevant part:

> Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party.

STATEMENT OF THE CASE

The Fair Debt Collection Practices Act

This case arises from an action under the FDCPA brought by petitioner Olivea Marx against respondent General Revenue Corporation (GRC). Congress enacted the FDCPA in 1977 in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," 15 U.S.C. § 1692(a), which had become "a widespread and serious national problem." S. Rep. No. 95-382, at 2 (1977).

Under the FDCPA, a debt collector may not "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collec-

tion of a debt," 15 U.S.C. § 1692d, use "any false, deceptive, or misleading representation or means in connection with the collection of any debt," *id.* § 1692e, or use "any unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f. These provisions prohibit, for example, threats of violence, repeated telephone calls, threats of legal action that cannot legally be taken or are not intended to be taken, and the use of deception to obtain information about a consumer. *Id.* §§ 1692d(1), (d)(5), (e)(5), (e)(10). With narrow exceptions, the statute also prohibits debt collectors from communicating with third parties such as a consumer's neighbors and employer in connection with the collection of a debt. *Id.* § 1692c(b). An exception to the prohibition allows a debt collector to communicate with third parties "for the purpose of acquiring location information about the consumer," *id.* § 1692b, and the statute defines "location information" to include only "a consumer's place of abode and his telephone number at such place, or his place of employment," *id.* § 1692a(7).

The FDCPA provides a private cause of action against "any debt collector who fails to comply with any provision of this title with respect to any person." *Id.* § 1692k(a). A debt collector is not liable, however, even for a proven violation, if the debt collector shows that the violation "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* § 1692k(c); S. Rep. No. 95-382, at 5. This exception to liability is known as the bona fide error defense. *See generally Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1604 (2010).

In a successful case brought by a consumer alleging a violation of the FDCPA, the statute provides for actual damages, statutory damages of up to $1,000, and "the costs

of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a). On the other hand, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Id.*

Factual Background and Proceedings Below

Ms. Marx sued GRC, a large debt collection agency, alleging several violations of the FDCPA. She alleged that GRC violated § 1692d, § 1692e, and § 1692f by threatening to garnish fifty percent of her wages, threatening to take money from her bank account, and calling her several times a day to annoy and harass her. J.A. 18. She also alleged that GRC violated § 1692c(b) by seeking information other than permitted "location information" when it communicated with her employer in connection with the collection of a debt. *See id.* at 18-19.

After a bench trial, the district court found for GRC on all of Ms. Marx's claims. As to Ms. Marx's testimony that GRC threatened in a phone call to garnish fifty percent of her wages, the judge stated that he did not doubt that she remembered the call as she described it, but that he "just cannot accept" that GRC would make that threat. *Id.* at 30. As to her testimony that GRC in one call suggested that she donate blood or get another job, the court stated: "That is alarming if it were true, but I am not accepting it." *Id.* And as to the claim that GRC's fax to her employer violated the FDCPA prohibition on third-party communications, the court held that the fax did not violate the bar on communicating with third parties "in connection with the collection of a debt" because, absent testimony from the recipient that she understood the fax to be in

connection with collection of a debt, the fax was not a "communication" at all. *See id.* at 31-32. The court thus effectively held that a debt collector can contact an employer to ask for information in addition to "location information," as long as the employer does not know that the request is coming from a debt collector. The court stated, however, that the question whether the fax violated the FDCPA was "close." *Id.* at 32.

GRC submitted a bill of costs seeking $7,779.16 in witness fees, witness travel expenses, and deposition transcript fees, *id.* at 37-40, and the court ordered Ms. Marx to pay GRC $4,543.03 in costs under Federal Rule of Civil Procedure 54(d). *Id.* at 37; Pet. App. 29a, 31a. The court rejected Ms. Marx's argument that the FDCPA, § 1692k(a)(3), limits cost awards to defendants to cases brought in bad faith and for the purpose of harassment; it held that the statutory language applies only to an award of attorney's fees. Pet. App. 28a-29a.

Ms. Marx appealed both the ruling that the fax to her employer was not a prohibited "communication" and the award of costs. The Tenth Circuit affirmed the judgment on the merits and affirmed the cost award under Rule 54(d).[1] Judge Lucero dissented on both issues.

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[1]The district court had also invoked Rule 68 as a basis for the cost award because GRC had made a Rule 68 offer of judgment before trial, which Ms. Marx had not accepted. Pet. App. 15a. The court had overlooked this Court's decision in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981), which held that Rule 68's provision for costs does not apply when a plaintiff does not prevail on her claims and thus does not "obtain" a "judgment" within the meaning of the Rule. Citing *Delta Air Lines*, the Tenth Circuit held that the district court had erred in this regard. Pet. App. 15a.

In affirming the cost award, the Tenth Circuit recognized that Rule 54(d) permits a prevailing party to recover costs "[u]nless a federal statute . . . provides otherwise," and that the FDCPA provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). The court read "the bad-faith-and-harassment provision of § 1692k(a)(3) to indicate two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" Pet. App. 7a. Thus, the court of appeals rejected GRC's argument that the reference to "costs" was merely part of a standard for determining the amount of attorney's fees awarded to a defendant (that is, that fees must be reasonable in relation to "the work expended and costs"). *See id.*

Despite its recognition that § 1692k(a)(3) expressly provides for the award of both fees and costs to defendants in bad-faith cases, the court went on to state that "only" an award of attorney's fees "is linked to a finding that the action has been brought by the plaintiff in bad faith." *Id.* 18a. The court held that § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to the costs of suit as a matter of course," and thus that the FDCPA does not "exclude Rule 54(d) costs from being" awarded. *Id.* 8a. That is, although initially recognizing that § 1692k(a)(3) sets forth a standard governing the award of costs—and one that differs from that of Rule 54(d)—the court ultimately held that § 1692k(a)(3) does not "provide otherwise" than Rule 54(d), and that Rule 54(d) is an

appropriate basis for awarding costs to an FDCPA defendant. *See* Pet. App. 14a.

Judge Lucero dissented. He found the FDCPA to be "clear and unambiguous" that an award of costs to the defendant is permitted only on a finding that the case was brought in bad faith and for the purpose of harassment. *Id.* 24a. Because the district court made no such finding in this case, Judge Lucero would have reversed the award of costs.

Ms. Marx filed a petition for rehearing or rehearing en banc on both the merits and costs issues. The petition was supported, as to both issues, by an amicus brief from the Consumer Financial Protection Bureau. The Tenth Circuit denied the petition.

SUMMARY OF ARGUMENT

I. The FDCPA provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). The plain language of this provision limits an award of costs (as well as fees) to a prevailing defendant to FDCPA cases brought in bad faith and to harass the defendant.

Under the Tenth Circuit's reading, the words "and costs" serve no function. That reading not only renders "and costs" "mere surplusage," Pet. App. 24a (Lucero, J., dissenting), but if the sentence's introductory clause did not apply to "and costs," those two words would be grammatically inexplicable. Because § 1692k(a)(3) can easily be read to give effect to each word in the sentence, the Court should hold that the provision means what it says, limiting

cost awards to prevailing defendants to cases brought in bad faith and for the purpose of harassment.

II. Federal Rule of Civil Procedure 54(d) establishes a presumption in favor of awarding costs to the prevailing party, "unless a federal statute . . . provides otherwise." By stating a basis for awarding costs that is different from the one stated in Rule 54(d), § 1692k(a)(3) "provides otherwise." This result flows cleanly from the text of both Rule 54(d) and § 1692k(a)(3). The Tenth Circuit's view that a more "clear and specific" statement is needed for a statute to displace the presumption of Rule 54(d) is at odds with the Rule's text and relevant authority.

ARGUMENT

I. Section 1692k(a)(3) Limits Cost Awards to Prevailing Defendants in FDCPA Cases to Actions Brought in "Bad Faith and for the Purpose of Harassment."

"On a finding by the court that an action under [the FDCPA] was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). As a majority of lower courts to have considered the issue recognize, a prevailing defendant may be awarded costs only if the plaintiff brought the case "in bad faith and for the purpose of harassment,"[2] just as the statute indisputably permits an

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[2] *See Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 704 (9th Cir. 2010); *Emanuel v. Am. Credit Exch.*, 870 F.2d 805, 809 (2d Cir. 1989) (dicta); *Puglisi v. Debt Recovery Solutions, LLC*, 822 F. Supp. 2d 218, 233-34 (E.D.N.Y. 2011); *Clark v. Brumbaugh & Quandahl, PC*, 731 F. Supp. 2d 915, 925-26 (D. Neb. 2010); *Bacelli* (continued...)

award of attorney's fees only in such circumstances. *See, e.g., Horkey v. J.V.D.B. & Assocs., Inc.*, 333 F.3d 769, 775 (7th Cir. 2003). "To read it otherwise is to suggest Congress passed a statute permitting a cost award conditioned upon a finding of bad faith, but intended to permit cost awards without a finding of bad faith." Pet. App. 25a (dissent).

A. The prevailing view follows directly from the plain language of § 1692k(a)(3). The subject of the sentence ("the court") acts through the same verb ("may award") equally on both direct objects: "attorney's fees" and "costs." The adverbial phrase, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment," applies to all the action in the sentence—that is, the award of fees and the award of costs. There is no grammatical basis to distinguish "fees" from "costs" in terms of what a court may do ("award" them) or under what circumstances a court may do it ("[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment"). *See Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb

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[2](...continued)
v. MFP, Inc., 2010 WL 4054107, at *1 (M.D. Fla. 2010); *Nakao v. Int'l Data Servs.*, 2007 WL 295537, at *2 (D. Haw. 2007); *Pavone v. Citicorp Credit Servs.*, 60 F. Supp. 2d 1040, 1049 (S.D. Cal. 2007); *Wilson v. Transworld Sys.*, 2003 WL 21488206, at *1 (M.D. Fla. 2003); *Csugi v. Monterey Fin. Servs.*, 2001 WL 1841444, at *1 (D. Conn. 2001); *Latimer v. Transworld Sys.*, 842 F. Supp. 274, 275 (E.D. Mich. 1993). *But see Thomasson v. GC Servs. Ltd. P'ship*, 2007 WL 3203037, at *2-*3 (S.D. Cal. 2007), *overruled by Rouse*, 603 F.3d 699; *Corridean v. Restore Fin. Servs.*, 2007 WL 1989622, at *3 (D. Or. 2007), *overruled by Rouse*, 603 F.3d 699.

. . . that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.").

If the sentence's introductory clause ("on a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment") does not apply to "and costs," those two words become untethered to the rest of the sentence. When the Tenth Circuit considered the sentence structure, it seemed to agree, as it recognized that § 1692k(a)(3) "indicate[s] two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purpose of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" Pet. App. 7a. Yet later, the court construed the provision *not* to limit cost awards to cases brought in bad faith, effectively reading the words "and costs" out of the sentence. The court's conclusion that "[o]nly" an award of attorney's fees "is linked to a finding that the action has been brought by the plaintiff in bad faith," Pet. App. 18a, contradicts its own earlier reading and finds no support in the statutory text. Indeed, the Tenth Circuit itself failed to offer any explanation of how "and costs" fits into the sentence if cost awards are not limited to cases brought in bad faith and for harassment. *Cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (rejecting reading that would render statutory provision "essentially without effect").

Although § 1692k(a)(3) states when costs "may" be awarded, not when they "may not" be awarded, "the natural meaning of 'may' in the context of the [sentence] is that it authorizes certain [awards]—ones that satisfy the subsequent condition—and no others." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004). In *Cooper Industries*, for instance, the Court considered a statute

providing that "[a]ny person may seek contribution . during or following any civil action under" certain other provisions of the statute. *Id.* (quoting 42 U.S.C. § 9613(f)(1)). The Court rejected the argument that "'may' should be read permissively," such that the condition ("during or after . . .") "is one, but not the exclusive, instance in which a person may seek contribution." *Id.* As the Court explained, if that argument were correct, Congress need not have included the explicit condition: "There is no reason why Congress would bother to specify the conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." *Id.* The same analysis applies here: There is no reason why Congress would specify a condition for the award of costs, and at the same time allow an award of costs absent that condition. *See* Pet. App. 25a (dissent, making similar point).

Similarly, in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), the Court considered the argument that the list of taxable costs in 28 U.S.C. § 1920 that a court "may" award does not preclude taxation of costs under Rule 54(d) above and beyond the items listed. Rejecting the argument, the Court found that "no reasonable reading of these provisions [§ 1920 and Rule 54(d)] together can lead to this conclusion, for petitioners' view renders § 1920 superfluous." *Id.* at 441. Again, the same is true here: If § 1692k(a)(3) does not preclude cost awards in FDCPA cases that were brought in good faith, the words "and costs" in § 1692k(a)(3) are superfluous.

Because § 1692k(a)(3) can be read to give meaning and purpose to every word, the court below erred in reading "and costs" to have no substantive effect. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (noting "the cardinal rule that, if possible,

effect shall be given to every clause and part of a statute" (citation omitted)); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (adopting reading that is "the only one that makes sense of each phrase in" statutory provision); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 112 ("[O]f course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

B. Stating that § 1692k(a)(3) "merely recognizes that the prevailing party is entitled to receive the costs of suit as a matter of course," Pet. App. 8a, the Tenth Circuit looked to the separate grant of authority to award fees and costs that is contained in the first sentence of § 1692k(a)(3). That sentence provides that a debt collector who violates the FDCPA "is liable" to a prevailing *plaintiff* for "the costs of the action, together with a reasonable attorney's fee as determined by the court." Because "Rule 54(d) already gives the prevailing party his costs," the court said that this sentence—and, by extension, the "bad faith" sentence at issue here as well—simply confirms Rule 54(d). *Id.*

The flaws in the court's chain of reasoning begin with its premise. The first sentence in § 1692k(a)(3)—providing for an award of costs and attorney's fees to a prevailing plaintiff—does *not* simply reiterate Rule 54(d). Rule 54(d) establishes only a presumption in favor of awarding costs, *see, e.g., Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1022 (9th Cir. 2003); *Whitfield v. Scully*, 241 F.3d 264, 270 (2d Cir. 2001); *Badillo v. Cent. Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983), but the presumption can be overcome by "a federal statute, the[] [federal] rules, or a court order." Given the exception for "a court

order," courts, including this Court, have recognized that district courts have discretion to deny costs to a prevailing party. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012) ("discretion granted by Rule 54(d)" is "a power to decline to tax, as costs, the items enumerated in § 1920" (quoting *Crawford Fitting Co.*, 482 U.S. at 442)); *Crawford Fitting Co.*, 482 U.S. at 441-42 (noting that Rule 54(d) "is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party").

In contrast, under the first sentence of § 1692k(a)(3), the prevailing plaintiff has a *nondiscretionary* entitlement to an award of costs and fees: A debt collector who loses a case under the FDCPA "is liable" for costs. *See Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir. 1995) (stating that where plaintiff brings successful action to enforce FDCPA, "'the statute requires the award of costs'" (quoting *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989))). By making an award of costs to a prevailing plaintiff mandatory, the first sentence of § 1692k(a)(3) "provides otherwise" than Rule 54(d)(1). Thus, the Tenth Circuit's theory that the plain language of the *second* sentence can be overlooked because *different* language in the *first* sentence "merely recognizes" Rule 54(d) fails at its premise.

Further, regardless of how one reads the first sentence of § 1692k(a)(3), the different language of the second sentence cannot reasonably be read "merely" to "recognize[]" that "the prevailing party is entitled to receive the costs of suit as a matter of course" unless one ignores the introductory clause that limits awards to cases "brought in bad faith and for the purpose of harassment." "If the statute [were] merely supplementing Rule 54(d) by allowing attorney's fees, then it would not have included an

express reference to costs." *Gwin v. Am. Rover Transp. Co.*, 482 F.3d 969, 974 (7th Cir. 2007) (interpreting similar language in then-current version of 46 U.S.C. § 2114(b)).

C. Below, GRC argued that § 1692k(a)(3) should be read to mean that, on a finding of bad faith, "the court may award to the defendant attorney's fees," which must be "reasonable in relation to the work expended and [to] costs." Although this reading at least gives some meaning to each word in the sentence, the court below properly rejected it on the ground that it is implausible given the language and context of the provision as a whole. *See* Pet. App. 7a-8a. "Attorney's fees and costs are legally distinct categories of monetary allowances made to successful litigants." *Id.* 7a. And "[c]osts are not part of the traditional methodology of determining the reasonableness of attorneys' fees, and for good reason." *Rouse*, 603 F.3d at 704. Costs under Rule 54(d) are defined and limited by 28 U.S.C. § 1920, *Crawford Fitting Co.*, 482 U.S. at 441, and the amount of costs expended bears no relationship to the reasonable amount of attorney time needed to prevail in a case. Thus, it would be a "logical fallacy to use costs to determine the reasonableness of attorneys' fees." *Rouse*, 603 F.3d at 704. "Such an approach [would] also [be] contrary to attorneys' fees jurisprudence." *Id. See generally Perdue v. Kenny A. ex rel Winn*, 130 S. Ct. 1662, 1672-73 (2010) (discussing calculation of a reasonable attorney's fee).

D. Finally, reading § 1692k(a)(3) to make both a fee award and a cost award contingent on a finding of bad faith is consistent not only with the grammar and sentence structure of the provision, but also with the purposes of the FDCPA. The FDCPA is designed to be enforced primarily by consumers who have been subjected to collection abuses. S. Rep. No. 95-382, at 5. Thus, FDCPA plaintiffs

are, by and large, people in debt who might be deterred from challenging abusive and deceptive collection practices by the possibility of being held liable for the defendants' costs in non-frivolous cases. Although cost awards "almost always amount to less than the successful litigant's total expenses," *Taniguchi*, 132 S. Ct. at 2006 (citation omitted), the awards can be significant, particularly for a financially strapped consumer already in debt. Here, for example, GRC requested $7,779 and was awarded $4,543, J.A. 37—no small amount for an individual consumer. The risk of deterring private enforcement cases is even more acute in light of the bona fide error defense, 15 U.S.C. § 1692k(c)—under which a plaintiff may successfully prove that the defendant violated the FDCPA but nonetheless lose her case, based on facts known only to the defendant prior to suit.

This Court has itself expressed concern that "chill[ing] private suits under the statutory right of action" would "undermin[e] the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman*, 130 S. Ct. at 1624 (citing FTC, *Collecting Consumer Debts: The Challenge of Change* 67 (2009) ("Because the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations.")). Properly construed, § 1692k(a)(3) minimizes the deterrent effect of presumptive cost awards to prevailing defendants, while "protect[ing] debt collectors from nuisance lawsuits, if the court finds that an action was brought by the consumer in bad faith and for harassment," by allowing for an award of fees and costs to the debt collector in that circumstance. S. Rep. No. 95-382, at 5; *see Rouse*, 603 F.3d at 705 (stating that § 1692k(a)'s limitation on award of costs to defendants

is "consistent with the stated intent of Congress"); *Lingis v. Motorola, Inc.*, __ F. Supp. 2d __, 2012 WL 1969332, at *4 (N.D. Ill. 2012) ("Applying Rule 54(d)'s stronger presumption in favor of awarding costs to prevailing defendants would upset the balance Congress struck between encouraging plaintiffs to bring actions that 'seemed reasonable at the outset' and deterring frivolous lawsuits." (addressing ERISA and quoting *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 720 n.6 (7th Cir. 1981)).

Because the plain language of § 1692k(a)(3) is consistent with the purpose of the FDCPA, there is no need to go beyond the unambiguous text to discern its meaning: On a finding that an action was brought in bad faith and for the purpose of harassment, the court may award costs to the defendant. Absent such a finding, the court may not award costs to the defendant.

II. Section 1692k(a)(3) "Provides Otherwise" Than Rule 54(d).

Rule 54(d) is straightforward: "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Discerning the meaning of "provides otherwise" is not a complicated endeavor: To "provide otherwise" is "[t]o set down as a stipulation or requirement" "[i]n another way; differently; [u]nder other circumstances." *American Heritage Dictionary Online*, http://ahdictionary.com/ (2011); *see Merriam-Webster Online*, http://www.merriam-webster.com (2012) (giving similar definitions); *Illustrated Oxford Dictionary* 577, 656 (revised ed. 2003) (giving similar definitions). It should be beyond question that § 1692k(a)(3) sets down a requirement or condition for an award of costs that is different from, or states other circumstances than, Rule 54(d). As

compared to the Rule's broad grant of discretion to award costs, the FDCPA provides a much more circumscribed discretion, limited to cases brought in bad faith and to harass.

A. A statute's text determines whether the statute "provides otherwise" than Rule 54(d). Thus, cases in which courts have recognized that a particular statute displaces Rule 54(d) do not undertake a special analysis to make that determination. They simply read the text of the statute at issue. "When the federal statute forming the basis for the action has an express provision governing costs, . . . that provision controls over the federal rules." *Brown v. Lucky Stores*, 246 F.3d 1182, 1190 (9th Cir. 2001) (citing Rule 54(d)(1)); *see, e.g.*, *Gwin*, 482 F.2d at 974 (holding that 46 U.S.C. § 2114(b), which provided for costs and fees to a prevailing defendant in cases found to be frivolous or brought in bad faith, superseded Rule 54(d)); *Nichol v. Pullman-Standard, Inc.*, 889 F.2d 115, 121 (7th Cir. 1989) (holding that Rule 54(d) does not apply in ERISA cases, in light of 29 U.S.C. § 1132(g)(1), which provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986) (recognizing that § 4 of Clayton Act, which provides that a person injured by an antitrust violation "shall recover" costs, 15 U.S.C. § 15(a), "supercedes a district court's discretion under Rule 54(d) to deny costs to a prevailing plaintiff in an antitrust suit"); *Moore v. Southtrust Corp.*, 392 F. Supp. 2d 724, 731, 735 (E.D. Va. 2005) (stating that Rule 54(d) does not apply in case under Electronic Fund Transfer Act, 15 U.S.C. § 1693m(f), which provides for award of fees and costs if suit was brought in bad faith or for purpose of harassment); *Barrera v. Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400, 404-05 (S.D.N.Y. 2004) (stating

that "court's award of costs in [copyright] action is to be rendered under the auspices of [Copyright Act] rather than that of the more general cost shifting provisions," Rule 54(d) and 28 U.S.C. § 1920); *see also Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 472-73 (6th Cir. 2003) (affirming denial of costs where applicable statute, 42 U.S.C. § 11113, which states that court shall award substantially prevailing defendant costs, including fees, "if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith," was not satisfied).

A statute could "provide otherwise" in several ways. "A statute that established a presumption against an award of costs, but without forbidding one, would provide 'otherwise' than the rule." *Loomis v. Exelon Corp.*, 658 F.3d 667, 674 (7th Cir. 2011). Likewise, "a statute establishing a presumption that the winner pays the loser's costs would provide 'otherwise' than Rule 54(d), even though it did not forbid an award to the winner." *Id.* A statute that defined costs to include attorney's fees would also provide otherwise. *E.g.*, 42 U.S.C. § 1988 (providing for an award to the prevailing party of "a reasonable attorney's fee as part of the costs"). And a statute that conditioned an award of costs on satisfaction of some condition would provide otherwise. *E.g.*, 49 U.S.C. § 60121(b) ("The court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless."). Section 1692k(a)(3) is an example of the last category.

B. Below, the Tenth Circuit stated that a "clear showing of legislative intent" is needed for a statute to provide otherwise than Rule 54(d). Pet. App. 8a; *id.* 14a (stating that statute cannot provide otherwise than Rule 54(d) without "clear and specific statutory command"). By "clear showing," the court evidently meant something more

than that the text of the statute must make a provision for costs that is different from that in Rule 54(d) because, as the court itself first parsed the text, *see id.* 7a, § 1692k(a)(3) would satisfy that standard. The court apparently meant that, to "provide otherwise" than Rule 54(d), a statute must not only make a different provision than the Rule for an award of costs, but must also expressly state that it displaces the Rule 54(d) presumption.

Applying a clear statement rule that requires more than statutory language that provides for cost awards in a different way than Rule 54(d) would be unjustified. "The clear statement rule was developed principally as a method for courts to ensure that Congress adequately deliberated before abrogating the states' Eleventh Amendment immunity from suit in federal court." Michael Lee, *How Clear Is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. Chi. L. Rev. 255, 255 (1998). Typically applied "to protect constitutional values through statutory interpretation," the rule protects, for example, the federalism values that underlie state sovereign immunity and the due process concerns that underlie the rule of lenity. *See* Matthew Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L.J. 2, 37 (2008) (footnotes omitted); *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 461, 463 (1991) (applying clear statement rule to statutes that address matters "at the heart of representative government," such as authority of states to determine qualifications of state officials).

Rule 54(d) is not based on a constitutional principle, and displacement of the presumption that it establishes implicates no "weighty and constant" values that would justify a clear statement rule. *See Astoria Sav. & Loan*,

501 U.S. at 108 (clear statement rules "prevail[] only to the protection of weighty and constant values, be they constitutional . . . or otherwise" (citations omitted)). Not surprisingly, a search for cases that mention a "clear statement" rule in connection with Rule 54(d), or any special burden applied to show that a statute "provides otherwise," turned up zero decisions. *Moore's Federal Practice* notes only one prerequisite for a statute to provide otherwise: "[F]or [a] statute to be considered contrary to Rule 54(d)(1), the statute must specifically mention 'costs.'" 10 Fern Smith, *Moore's Federal Practice* ¶ 54.101 (3d ed. 1997); *cf. U.S. ex rel. Costner v. United States*, 317 F.3d 889, 890-91 (8th Cir. 2003) (holding that False Claims Act, 31 U.S.C. § 3730(d)(4), which allows for award of "attorney's fees and expenses" to prevailing defendant if "claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" does not provide otherwise than Rule 54(d) because it does not mention "costs").

As the leading civil procedure treatises agree, "Congress frequently provides for the award of costs when it creates specific statutory rights," but "[t]hese enactments are so numerous and their treatment of costs is so variant that it would serve no useful purpose to collect them[.]" 10 Charles Alan Wright, et al., *Federal Practice & Procedure* § 2670 (3d ed. 2012); *accord Moore's Federal Practice* ¶ 54.101 ("statutes preempting the court's discretion under Rule 54(d)(1) are far too numerous to list comprehensively"). The routine provision for cost awards on terms that vary from those of Rule 54(d) belies the notion that a special showing beyond the plain text of the statute is needed to displace the Rule.

The Tenth Circuit offered little basis for applying a clear statement rule. It stated that, although Congress has

the power to enact statutes that supersede the Rules, "subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible." Pet. App. 8a. (citation and internal quotation marks omitted). This observation, however, adds nothing to the analysis. Because Rule 54(d) expressly contemplates that a statute may "provide otherwise" and, in that way, displace operation of the Rule in a given case, a statute that provides otherwise does not conflict with or impliedly repeal the Rule. That is, like a court order that "provides otherwise" by denying costs to a prevailing party in a particular case, a statute that "provides otherwise" by imposing conditions on cost awards in particular cases is consistent with, and, indeed, contemplated by, the express terms of Rule 54(d). No limiting construction is needed to "harmonize" such a statute with Rule 54(d).[3]

Not only does the limitation on cost awards under § 1692k(a)(3) pose no conflict with the plain language of Rule 54(d), but it poses no threat to the policies behind the Rule. For example, courts have recognized that denial of a Rule 54(d) cost award may be appropriate where the losing party has limited financial resources. *See, e.g.*, *Champion Produce*, 342 F.3d at 1022; *Whitfield*, 241 F.3d at 270; *Badillo*, 717 F.2d at 1165. And courts have recognized that, in some circumstances, the chilling effect that imposing costs would have on future litigants in similar cases or the public importance of the issues involved in a case may counsel against awarding costs under Rule 54(d). *See, e.g.*,

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[3]Conversely, as discussed in part I, a Rule 54(d) award to a prevailing defendant in an FDCPA case absent a finding of bad faith cannot be "harmonized" with § 1692k(a)(3). *See Crawford Fitting Co.*, 482 U.S. at 442 ("We cannot accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning.").

Champion Produce, 342 F.3d at 1022 (citing *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 592 (9th Cir. 2000) (civil rights case)); *White & White*, 786 F.2d at 731 (antitrust case brought by small business); *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 2011 WL 4375039, at *8 (S.D. Fla. 2011) (Clean Water Act case). These considerations also come into play in the FDCPA context, where Congress placed primary responsibility for statutory enforcement on individuals in debt and provided defendants a bona fide error defense that can enable them to avoid liability even in cases where the plaintiff's claim is meritorious. *See* 15 U.S.C. § 1692k(c); S. Rep. No. 95-382, at 5. By permitting cost awards only against plaintiffs who sue in bad faith, the FDCPA substituted a more protective rule that codifies the same concern about the resources of financially disadvantaged litigants that courts, as a matter of policy, accept as a permissible basis for overcoming the Rule 54(d) presumption.

C. By superimposing a clear statement rule onto Rule 54(d)'s "provides otherwise" language, the court below transformed the presumption in favor of an award of costs *where* Rule 54(d) applies into a presumption *that* Rule 54(d) applies. In support of this approach, the court cited four other provisions in Title 15 of the U.S. Code that address cost awards. The court suggested that these provisions show a "long and consistent judicial interpretation" of other laws under Title 15 that provide for an award of costs: "No circuit has found that any of these provisions displaced Rule 54(d)," the court stated. Pet. App. 12a. That statement is quite misleading.

None of the four provisions cited by the court below is the subject of a "long and consistent judicial interpretation." In fact, a Westlaw search shows that no court of appeals has ever addressed the relationship between any

of the four provisions and Rule 54(d), and only one district court decision has done so. In that case, *Moore v. Southtrust Corp.*, the district court considered 15 U.S.C. § 1693m(f), a provision of the Electronic Fund Transfer Act (EFTA) that is similar to § 1692k(a)(3).[4] The court held that the statute—not Rule 54(d)—applies. *See* 392 F. Supp. 2d at 731 (assessing evidence of bad faith "to determine if the defendant is entitled to reasonable attorney's fees and costs" and stating that "the entitlement to costs in this case is set forth by statute"); *see also Bonarrigo v. Prosperity Bank*, 2012 WL 2864496, at *2 (N.D. Tex. 2012) (awarding costs to prevailing defendant in EFTA case "brought in bad faith and/or for the purposes of harassment"); *Puglisi*, 822 F. Supp. 2d at 233-34 (denying costs to prevailing defendant in case under EFTA and FDCPA because it was not brought in bad faith and for purpose of harassment).

As to the other three provisions cited in the opinion below, one, 15 U.S.C. § 15c(d)(2), provides for attorney's fees but does not mention costs at all. Thus, it is not surprising that no reported opinion addresses the relationship between § 15c(d)(2) and the availability of costs under Rule 54(d). And the remaining two provisions cited by the court below—15 U.S.C. § 78u(h)(8) and 15 U.S.C. § 4304(a)(1)—"provide otherwise" by, among other things, using the word "shall" to eliminate the court's discretion with respect to costs in certain cases.

In addition, because it listed only four selected provisions of Title 15, the court overlooked *White & White*, in

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[4]Section 1693m provides: "On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."

which the Sixth Circuit recognized that the Clayton Act, 15 U.S.C. § 15(a), which provides that an injured person "shall recover" costs, "supercede[s] a district court's discretion under Rule 54(d) to deny costs to a prevailing plaintiff." 786 F.2d at 731 n.1.

In short, aside from the Tenth Circuit here, courts considering whether a statutory provision "provides otherwise" than Rule 54(d) have not looked for a special statement, such as "Rule 54(d) does not apply." Rather, a statute "provides otherwise" than Rule 54(d) if it states a different basis for a cost award than the basis stated in Rule 54(d). That is the case here. By its express terms, Rule 54(d) does not apply.

CONCLUSION

The Tenth Circuit's decision affirming an award of costs to GRC should be reversed.

Respectfully submitted,

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

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RESPONDENT'S BRIEF

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BRIEFS

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IN THE

Supreme Court of the United States

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

ERIC D. REICIN
Deputy General Counsel
SALLIE MAE, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 984-6528

KEVIN T. DREYER
Associate General Counsel
SALLIE MAE, INC.
11501 Northlake Drive
Cincinnati, OH 45249
(513) 605-7551

LISA S. BLATT
Counsel of Record
ROBERT J. KATERBERG
ANTHONY J. FRANZE
DIRK C. PHILLIPS
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

ADAM L. PLOTKIN
STEVEN J. WIENCZKOWSKI
621 17th Street
Suite 1800
Denver, CO 80211
(303) 296-3566

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

The question presented in the petition is "whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not 'brought in bad faith and for the purpose of harassment.'" Pet. i (quoting 15 U.S.C. § 1692k(a)(3)).

RULE 29.6 STATEMENT OF CORPORATE DISCLOSURE

General Revenue Corporation is wholly owned by Asset Performance Group, LLC, which is wholly owned by SLM Corporation, a publicly traded company commonly known as "Sallie Mae."

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IN THE

Supreme Court of the United States

No. 11-1175

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

STATUTORY PROVISIONS AND RULES INVOLVED

Section 1692k of Title 15, U.S.C., and Federal Rules of Civil Procedure 54 and 68 are reproduced at Appendix 1a-6a, *infra*.

STATEMENT

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p, authorizes courts to award debt collectors their attorney's fees and costs when a suit is brought for improper purposes. 15 U.S.C. § 1692k(a)(3). Petitioner construes this pro-defendant provision as an extraordinary pro-plaintiff provision that would make innocent debt collectors worse off

than virtually every other litigant in our legal system. This Court should reject that counterintuitive proposition. The statute's text, structure, history, and purpose confirm that Section 1692k(a)(3) is a sanction that does not displace a court's discretion under Federal Rule of Civil Procedure 54(d) to award costs to the prevailing party.

1. In 2007, petitioner defaulted on a federally-guaranteed student loan. After the California agency that guaranteed the debt was unable to obtain repayment, the agency in September 2008 hired respondent General Revenue Corporation (GRC). Pet. App. 2a. GRC provides collection services for public and private colleges and universities and state agencies that guarantee student loans under federal student loan programs. Trial Tr. 79.

One month after GRC began collection efforts on her federally-guaranteed loan, petitioner sued GRC for alleged violations of the FDCPA. Because defending even a meritless FDCPA suit can be costly, GRC early on offered to settle the case. Pet. App. 15a. GRC made an offer of judgment under Federal Rule of Civil Procedure 68 to pay petitioner her reasonable accrued attorney's fees and costs as well as $1,500—which is $500 more than the maximum recoverable statutory damages. JA 34-36; *see* 15 U.S.C. § 1692k(a)(2)(A). Petitioner did not respond to the offer, and the parties prepared for trial. JA 35. Petitioner deposed six GRC employees, and GRC deposed petitioner. JA 39. As is customary, GRC ordered the deposition transcripts for a cost of $2,659.05. *Id.*

On May 17, 2010, the district court held a bench trial. GRC presented four witnesses and designated deposition testimony of two other witnesses. Trial Tr. 131. GRC paid statutory attendance and subsistence fees for three GRC employee-witnesses, totaling $1,439. JA 38. GRC spent an additional $1,485.67 to fly them from Indianapolis to testify at trial. *Id.* Because petitioner's counsel refused to stipulate to the formatting of telephone records that petitioner herself had subpoenaed from Sprint, GRC spent $1,003.40 for a Sprint representative to travel from Kansas City to testify about those records. *Id.*; Trial Tr. 188-98.

2. The trial court held that GRC did not violate the FDCPA and entered judgment against petitioner. JA 26-33. The court found that GRC's limited communications with petitioner were lawful. JA 29-30, 32-33. The court also held that an employment-status inquiry that GRC sent by facsimile to petitioner's employer complied with the Act because the facsimile did not reveal petitioner's debt. JA 30-32.

Federal Rule of Civil Procedure 54(d) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." As the prevailing party, GRC filed with the clerk of court a bill of costs seeking $7,779.16, which included, *inter alia*, $2,659.05 for payments to court reporters for deposition transcripts and $3,928.07 in expenses for GRC's four trial witnesses. JA 37-40; *see* 28 U.S.C. § 1920. The clerk awarded $4,543.03 in costs. JA 37.

Both parties filed post-trial motions. GRC argued that the clerk improperly disallowed several items of costs. Dkt. #81. Petitioner, in turn, did not contest the amount or ask the court to reduce the award based on her financial hardship. Dkt. #77; *see Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004). Instead, petitioner argued that the court lacked authority to award any costs under Rule 54(d) or Rule 68 by virtue of 15 U.S.C. § 1692k(a)(3). That provision states in part: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). Petitioner argued that because the district court made no finding of improper motive, the court had no authority to award costs.

The district court did not alter the clerk's taxation of costs and rejected petitioner's interpretation of Section 1692k(a)(3). Pet. App. 28a-29a. The court explained that "[t]he statutory language requiring a finding of bad faith and harassment is applicable only for an award of attorney fees and does not displace Rule 54(d)." *Id.* at 29a. The district court also concluded that the award of costs was warranted under Rule 68. *Id.*

3. The court of appeals affirmed. *Id.* at 1a-25a. The court held that GRC did not violate the FDCPA because the facsimile sent to petitioner's employer was not a prohibited communication with a third-party regarding a debt. *Id.* at 4a-6a. On May 29, 2012, this Court declined to review that aspect of the court's judgment. 132 S. Ct. 2688 (2012).

The court of appeals further rejected petitioner's argument that 15 U.S.C. § 1692k(a)(3) extinguishes a district court's authority to award costs under Rule 54(d). Pet. App. 6a-14a. The court observed that the "presumption that a prevailing party is entitled to costs is, in our legal system, a venerable one." *Id.* at 8a. The court found "nothing" in the text, history, or purpose of Section 1692k(a)(3) "that should prevent Rule 54(d)'s normal operation." *Id.* at 14a. The court also explained that conditioning an award of costs on a finding of a plaintiff's misconduct would unjustifiably penalize innocent debt collectors. *Id.*

The court disagreed, however, with the district court's alternative rationale under Rule 68. The court explained that under *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), "Rule 68 applies only where the district court enters judgment in favor of a plaintiff" for less than the amount of the settlement offer, and not where the plaintiff loses outright, as in this case. Pet. App. 15a.

Judge Lucero dissented. *Id.* at 19a-25a. He would have found that the facsimile violated the FDCPA, *id.* at 20a-21a, and that the Act precludes an award of costs to prevailing defendants absent a finding of bad faith and a purpose to harass, *id.* at 25a.

SUMMARY OF ARGUMENT

I. Federal Rule of Civil Procedure 54(d) states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs . . . should be allowed to the prevailing party." The FDCPA does not "provide[] otherwise."

A. No provision of the FDCPA limits a court's authority to award costs to innocent debt collectors that successfully defend against meritless suits. Rather, Section 1692k(a)(3) states that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees . . . and costs." That language is purely permissive, and the reference to "and costs" is best understood to confirm a court's authority to award costs in addition to attorney's fees when plaintiffs bring suit for improper purposes.

Three aspects of the statutory structure confirm that the provision does not strip courts of their discretion to award costs to prevailing parties under Rule 54(d). First, the provision as a whole exclusively addresses misconduct by parties—plaintiffs and defendants alike. Section 1692k(a)(3) does not address this situation, where neither side engages in conduct prohibited by the Act. Second, the first sentence of Section 1692k(a)(3) authorizes courts to award attorney's fees and costs to *plaintiffs*. The second sentence merely maintains that parallelism with respect to *defendants*. Had it not, the absence of "and costs" in the second sentence could have been read to preclude cost awards to defendants facing abusive suits. Third, just as the reference to *attorney's fees* in the second sentence overlaps with and does not displace a court's existing inherent authority

to award attorney's fees against a party acting in bad faith, *e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), the words "and costs" in the second sentence likewise overlap and do not displace a court's existing authority under Rule 54(d).

Congress legislated against the backdrop that an award of attorney's fees is presumptively precluded and an award of costs is presumptively allowed. When read in light of that context, the introductory clause—"[o]n a finding that [the] action . . . was brought in bad faith and for the purpose of harassment"—does not have the same limiting application to costs as it does to attorney's fees. That conclusion comports with common parlance when a speaker refers to two objects with differing background presumptions.

B. The fact that Congress frequently limits a court's discretion to award costs in terms of an explicit prohibition strongly undercuts petitioner's theory that the FDCPA limits a court's discretion by mere implication. A plethora of statutes expressly provide that plaintiffs "shall not be liable for costs" with the manifest purpose to protect *plaintiffs*. These provisions contrast sharply with Section 1692k(a)(3), which is not phrased in terms of a prohibition and has the manifest purpose to protect *defendants*.

C. The canon against surplusage does not justify reading the provision contrary to its purpose to protect debt collectors. The provision removes any doubt as to the availability of costs in cases of abusive lawsuits. Congress also might have intended to authorize costs even if the debt collector was not a prevailing party under Rule 54(d). In the end, however, it does not matter if the reference to "and

costs" *is* superfluous. Congress frequently authorizes courts to award costs in a manner that overlaps with Rule 54(d). *E.g.*, 12 U.S.C. § 5565(b) ("the [Consumer Financial Protection] Bureau . . . may recover its costs . . . if [it] is the prevailing party in the action"). Petitioner's construction also does not rid the statute of all redundancy. The statutory authorization to award attorney's fees and costs is redundant with a court's inherent authority to redress bad faith conduct by litigants. And under both petitioner's and the government's reading of the introductory clause, either the phrase "in bad faith" or "for the purpose of harassment" is redundant.

D. The statutory history and purpose confirm that the statute does not displace Rule 54(d). Congress added the second sentence of Section 1692k(a)(3) to give debt collectors *more* protection than lenders receive under the Truth in Lending Act (TILA). Petitioner's construction would turn that purpose on its head and would inexplicably make FDCPA defendants worse off than TILA defendants, which may seek costs as prevailing parties.

Petitioner's construction likewise perversely assumes that Congress, by enacting a provision designed to *protect* innocent debt collectors, made debt collectors worse off than virtually all other litigants in our legal system. Petitioner's position would prevent innocent debt collectors from recovering their costs to defend even "frivolous, unreasonable, or groundless" suits. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). And petitioner's construction would render debt collectors worse off than other credit and financial institutions under the Consumer Credit Protection Act, an umbrella statute that includes both the FDCPA and TILA. Petitioner

offers no rationale for why Congress would treat debt collectors less favorably than the CCPA-covered institutions that extend credit to consumers in the first place and that depend on the debt collection industry.

Petitioner also errs in presuming that Congress wanted to afford special treatment to losing FDCPA plaintiffs (including those who default on federally-guaranteed loans) because they are debtors. Rule 54(d) applies to all litigants who proceed *in forma pauperis*, 28 U.S.C. § 1915(f)(1), as well as to cash-strapped consumers and debtors who lose suits under the CCPA. Moreover, Rule 54(d) is not an absolute rule. Cost-shifting is discretionary. Thus, "a substantiated claim of the losing party's indigency may justify a reduction or denial of costs to the prevailing party." 10 James Wm. Moore et al., Moore's Federal Practice § 54.101[1][b], p. 54-157 (3d ed. 2012) [hereinafter Moore's]. Courts have ample authority to reduce or waive a cost award based on financial hardship. Petitioner sought no such relief in this case.

E. An exemption from the possibility of cost-shifting is not necessary to enforce the FDCPA. Congress encouraged private enforcement by awarding monetary relief to *prevailing* plaintiffs. Congress did not intend to encourage meritless suits by exempting *losing* plaintiffs from the normal incident of defeat. Empirically, the number of new FDCPA suits has not diminished even after defendants have been awarded costs. Application of Rule 54(d) would no more chill meritorious suits than application of the rule chills other suits under the CCPA.

II. Although this Court need not reach the issue because the FDCPA does not preclude the normal operation of Rule 54(d), the cost award was inde-

pendently required by Federal Rule of Civil Procedure 68(d). GRC offered petitioner $1,500 and her accrued reasonable attorney's fees and costs to settle, and petitioner obtained an adverse judgment that was less favorable than the offer she rejected. A bare majority in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), held that Rule 68 shifts costs only when plaintiffs prevail in a lesser amount than the offer, not when plaintiffs lose altogether. That decision is illogical and contrary to the Rule's clear text and purpose to encourage settlement. But *Delta* is particularly pernicious if petitioner is correct that costs are not available under Rule 54(d). Debt collectors would face FDCPA suits with both hands tied behind their backs, *i.e.*, with neither Rule 54(d) to discourage frivolous suits nor Rule 68 to encourage settlement of such suits. This Court should overrule *Delta* if the Court concludes that Section 1692k(a)(3) bars prevailing defendants from seeking costs under Rule 54(d).

Delta creates a highly anomalous regime that the drafters of the Rule could not have intended: "a plaintiff who has refused an offer under Rule 68 and then has a 'take nothing' judgment entered against her [w]ould be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68." 450 U.S. at 375 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart, J.); *accord id.* at 362 (Powell, J., concurring in the result) (noting that it is "anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*"). The majority in *Delta* relied on language in Rule 68 that has since changed, as

well as an erroneous and outmoded view of practice in state courts. No good reason supports retaining *Delta*'s nullification of Rule 68 in cases such as this one where the Rule's application makes the most sense.

ARGUMENT

I. THE FAIR DEBT COLLECTION PRACTICES ACT DOES NOT PROHIBIT DISTRICT COURTS FROM AWARDING COSTS TO PREVAILING DEFENDANTS

Under the "bedrock principle known as the 'American Rule' . . . [e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156-57 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983)); *accord Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001) ("the prevailing party is not entitled to collect [attorney's fees] from the loser"). Thus, although GRC prevailed at trial, the company is out of pocket for the attorney's fees it was forced to incur to defend against a meritless lawsuit.

The opposite presumption exists, however, with respect to costs. "Courts generally, and this Court in particular, . . . have a presumptive rule for costs." *Buckhannon*, 532 U.S. at 606 n.8; *see* Sup. Ct. R. 43. "[B]y long established practice . . . in actions at law, the prevailing party is entitled to recover a judgment for costs." *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 387 (1884); *see Buckhannon*, 532 U.S. at 606 n.8 (quoting same); *id.* at 611 (Scalia, J., concurring) (quoting same); *In re Peterson*, 253 U.S. 300, 316 (1920); Philip M. Payne, *Costs in Common Law*

Actions in the Federal Courts, 21 Va. L. Rev. 397 (1934-35) (tracing costs awards in England to the Statute of Gloucester in 1278); *see also* Fed. R. Civ. P. 54(d) 1937 advisory committee's note (citing *Peterson* and Payne). The Judiciary Act of 1789 incorporated this tradition through provisions "allow[ing] costs to the prevailing party, as incident to the judgment" in actions at law. *The Baltimore*, 75 U.S. 377, 390 (1869). In short, "liability for costs is a normal incident of defeat." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

Federal Rule of Civil Procedure 54(d) codifies a district court's discretion to award costs to a prevailing party by stating that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). A federal statute does not "provide[] otherwise" and thereby displace a court's discretion under Rule 54(d) unless the statute is "contrary" to the rule. 10 Moore's § 54.101[1][c], at 54-159. The word "otherwise"—as petitioner and the government acknowledge—means "differently," Pet. Br. 16, "to the contrary," Merriam-Webster On-line, http://www.merriam-webster.com (cited Pet. Br. 16), or "contrarily." Roget's International Thesaurus 779.9, 780.8, 780.11 (7th ed. 2010); J.I. Rodale, The Synonym Finder 818 (1986) ("contrarily, inversely, in reverse, conversely"); *see also* U.S. Br. 11 (Rule 54(d) "yields to contrary provisions"); *id.* at 12 (Rule 54(d) does not apply "in the event of any inconsistency"). The judgment below therefore must be affirmed unless the FDCPA mandates a contrary rule that reflects congressional intent to displace a court's discretion under Rule 54(d). Normal rules of statutory construction compel the conclusion that the FDCPA evinces no such intent.

A. Section 1692k(a)(3)'s Text and Structure Preclude an Inference that the Statute Bars an Award of Costs Under Rule 54(d)

1. The second sentence of 15 U.S.C. § 1692k(a)(3) states: "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." That text authorizes a sanction against FDCPA plaintiffs who abuse the Act's private right of action. That sanction does not limit a court's preexisting authority to award costs. The text is purely permissive and nowhere restricts a district court's discretion under Rule 54(d) to award costs to prevailing defendants. The court of appeals thus correctly held that "[n]othing in the language of the statute purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits." Pet. App. 8a.

The statutory structure in three respects confirms that the statute does not address, much less eliminate, a court's presumptive authority under Rule 54(d) to award costs to prevailing defendants. First, all the provisions leading up to the second sentence of Section 1692k(a)(3) impose liability for *misconduct*. Subsections (a)(1) and (a)(2) make a debt collector that violates the Act liable for actual damages sustained by the debtor and up to $1,000 in statutory damages. 15 U.S.C. § 1692k(a)(1), (a)(2). Subsection (a)(3)'s first sentence further imposes liability on such a debt collector for "the costs of the action, together with a reasonable attorney's fee as determined by the court." *Id.* § 1692k(a)(3). Likewise,

Subsection (a)(3)'s second sentence redresses misconduct—albeit by the plaintiff.

In this case, neither the plaintiff nor the defendant acted wrongfully: petitioner did not bring her lawsuit with an improper motive, and GRC did not violate the FDCPA. Neither party has engaged in misconduct that Section 1692k(a) deters or remedies. The Act is silent with respect to this situation. Indeed, the statute does not even mention prevailing defendants, the subject of Rule 54(d). And silence, as the government acknowledges (U.S. Br. 19-20), triggers the normal default rules under our legal system, with each side bearing its own attorney's fees under the American Rule, and the prevailing party entitled to seek an award of costs under Rule 54(d). As the court of appeals aptly stated, the notion "that a plaintiff's bad faith should obligate him to pay his opponent's attorney's fees hardly suggests that his good faith should relieve him of paying his opponent's *costs*." Pet. App. 9a. In other words, Congress's aim of redressing misconduct does not suggest any intent to deprive prevailing defendants of their presumptive right to seek costs as prevailing parties under Rule 54(d).

Second, Section 1692k(a)(3)'s principal focus is awarding attorney's fees. S. Rep. No. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N 1695, 1700 (section-by-section summary of Section 1692k(a)) ("Where a court finds that a suit was brought by a consumer in bad faith and for harassment, the court may award reasonable attorney's fees to the defendant."). The statute's passing reference to "and costs" at the end of the second sentence is best read as confirming that defendants additionally may seek costs consistent with existing law. In this respect,

the word "and"—which immediately precedes "costs" in Section 1692k(a)(3)—has its commonly understood meaning of "in addition to" attorney's fees that normally are not allowed. *See* The Compact Edition of the Oxford English Dictionary 79 (1971) (defining "and" as a conjunction "[i]ntroducing a word . . . which is to be taken side by side, along with, or in addition to, that which precedes it"); The American Heritage Dictionary 66 (4th ed. 2006) ("Together with or along with; in addition to; as well as."); Oxford American Writer's Thesaurus 35 (2d ed. 2008) ("together with, along with, with, as well as, in addition to, also"); Roget's International Thesaurus 253.13 (similar). The second sentence provides for shifting of attorney's fees contrary to the usual presumption while confirming that costs are shifted in accordance with the usual permissive rule.

Congress often employs language "out of an abundance of caution" and "to remove any doubt" on an issue. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226-27 (2008) (quoting *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 646 (1990)). Without the two words "and costs," doubt might have existed from a lack of parallelism between the first and second sentences of subsection (a)(3). The first sentence authorizes *plaintiffs* who show a violation of the FDCPA to recover both attorney's fees *and costs*. The second sentence likewise authorizes *defendants* victimized by abusive lawsuits to receive attorney's fees *and costs*. Had Congress included costs in the first but not the second sentence, the omission might have led to confusion as to whether costs were available to defendants under the second sentence. By adding "and costs" to the second sentence, Congress foreclosed the argument that, under *expressio unius est exclusio alterius*, the expression of costs in the first

sentence and exclusion of the same term in the second meant that defendants could recover only attorney's fees, and not costs.

Third, Section 1692k(a)(3)'s authorization to award a defendant attorney's fees overlaps with a court's inherent authority to award attorney's fees based on a litigant's misconduct, including bad faith. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). Thus, the statute as a whole confirms a court's inherent authority respecting fee-shifting and a court's rule-based authority respecting cost-shifting. This Court has observed that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49. Analogously, Section 1692k(a)(3) should not be read to exclude the normal operation of Rule 54(d) simply because Congress authorizes a cost award as part of a sanction.

2. Petitioner argues that by listing the circumstance where a court "may" award "attorney's fees . . . and costs" (*i.e.*, "[o]n a finding . . . that an action . . . was brought in bad faith and for the purpose of harassment"), Congress made that circumstance the "only" basis for a court to award costs. Pet. Br. 8, 9; U.S. Br. i, 7, 20-21. The meaning of any text, however, depends on context. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk*, 132 S. Ct. 1670, 1681 (2012). The statement that "on Veterans Day, you should thank a veteran for his service" does not imply that the speaker disapproves of expressions of appreciation to veterans on all other days of the year. Similarly, Congress's statement that fee-shifting and cost-

shifting are appropriate sanctions does not imply that Congress disapproves of cost-shifting as an ordinary incident of defeat. Congress did not frame Section 1692k(a)(3) as a prohibition or include the word "only" or "unless," as Congress has done under a myriad of other statutes. *See infra* pp. 19-21. Rather, Congress targeted a specific form of misconduct without altering the background presumption of cost-shifting to prevailing parties.

Petitioner, observing that Section 1692k(a)(3) refers to both "attorney's fees" *and* "costs," argues that the introductory clause of "bad faith and for the purpose of harassment" must apply equally to both objects or otherwise the words "and costs" become "grammatically inexplicable." Pet. Br. 7; *id.* at 9. But again, context matters, as the Veterans Day example shows. The same analysis is true when two objects are in a sentence. Whether to infer a condition depends on background presumptions associated with the object. Here, Congress legislated against the backdrop that, in our legal system, an award of attorney's fees is presumptively precluded but costs are presumptively awarded. As such, the introductory clause is best understood to limit a court's statutory authority to award attorney's fees.

Take, for instance, a parent's statement to her child that "if you eat your dinner, you may have cookies." The sentence naturally means that the child may have cookies *only* if the child eats her dinner. That inference of conditionality flows from the background understanding that cookies are an exceptional and unexpected treat. On the other hand, consider the same parent's statement to her child that "if you eat your dinner, you may have cookies and milk." The inference of conditionality

applicable to cookies is unwarranted for the words "and milk" because children presumptively are expected to drink milk before, during, and after dinner. For that reason, the introductory clause ("if you eat your dinner") does not have the same limiting application for milk as it does for cookies.

Similarly, take a parent's statement to her son that "if you tease your sister, I may give her your allowance next week." That statement implies that the parent will redirect the son's allowance to his sister *only* if he teases her. That implication is warranted because the son otherwise presumes he will get his weekly allowance. But now consider the same parent's statement "if you tease your sister, I may give her your allowance and her allowance." No one could reasonably infer that, by adding the words "and her allowance" the parent conditioned the daughter's own allowance on being teased by her brother. Rather, the parent's statement is meant to deter the son's misconduct while confirming the backdrop understanding that the daughter will also receive her presumptive weekly allowance if she is teased. Section 1692k(a)(3) is no different. The statutory reference to "and costs" is functionally equivalent to "and her allowance." The statute deters misconduct by plaintiffs while confirming that defendants may seek costs in addition to their attorney's fees.

B. Congress's Use of Explicit Language in Other Statutes to Restrict Cost Shifting Weighs Against Inferring a Limitation in Section 1692k(a)(3)

1. Section 1692k(a)(3) grants courts remedial authority to award fees and costs with the manifest purpose of protecting innocent *defendants*. That provision markedly contrasts with the plethora of

statutes that explicitly prohibit courts from awarding costs with the manifest purpose of protecting *plaintiffs*. In the limited instances when Congress has departed from the presumptive rule of cost-shifting, Congress generally provides that plaintiffs "shall not be liable for costs." *See* 7 U.S.C. § 18(d)(1) (Commodity Exchange Act) ("[t]he petitioner shall not be liable for costs in the district court"); 7 U.S.C. § 210(f) (Packers and Stockyards Act) ("the petitioner shall not be liable for costs in the district court"); 7 U.S.C. § 499g(b) (Perishable Agricultural Commodities Act) ("the petitioner shall not be liable for costs in the district court"); *id.* § 499g(c) ("[a]ppellee shall not be liable for costs in [district] court"); 33 U.S.C. § 918(a) (Longshore and Harbor Workers' Compensation Act) ("the applicant shall not be liable for costs in a proceeding for review of the judgment"); 45 U.S.C. § 153(p) (Railway Labor Act) ("the petitioner shall not be liable for costs in the district court"); 46 U.S.C. § 41309(d) (Suits in Admiralty Act) ("plaintiff is not liable for costs of the action or for costs of any subsequent stage of the proceedings unless they accrue on the plaintiff's appeal"); 47 U.S.C. § 407 (Communications Act of 1934) ("petitioner shall not be liable for costs in the district court"); 49 U.S.C. § 11704(d)(1)(C) (ICC Termination Act of 1995) ("plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff"); *cf.* Fed. R. Civ. P. 71.1(*l*) (for condemnation proceedings, "[c]osts are not subject to Rule 54(d)").

Those statutes show that Congress knows how to foreclose a court's discretion under Rule 54(d) when Congress so intends. *Small v. U.S.*, 544 U.S. 385, 399 (2005) ("Congress' explicit use of [language] in other provisions shows that it specifies such restrictions when it wants to do so."). Had Congress

wanted to condition an award of costs under the FDCPA exclusively upon a finding of misconduct, it easily could have said so. Other statutes explicitly confine the discretion of courts to award costs. *See* 28 U.S.C. § 1928 ("no costs shall be included in such judgment, *unless* the proper disclaimer has been filed in the United States Patent or Trademark Office") (emphasis added); 42 U.S.C. § 1988(b) ("in any action brought against a judicial officer . . . such officer shall not be held liable for any costs . . . *unless* such action was clearly in excess of such officer's jurisdiction") (emphasis added). By contrast, Congress phrased the second sentence of Section 1692k(a)(3) neither as a prohibition nor in terms of an exclusive condition.

2. Congress's general practice of using express terms to limit a court's discretion under Rule 54(d) comports with congressional practice at the time of Rule 54's adoption. The 1937 advisory committee notes to Rule 54(d) list 36 statutes as "unaffected" by the Rule. Those provisions overwhelmingly were contrary to Rule 54. Most statutes either explicitly *prohibited* cost-shifting[1] or explicitly *mandated* cost-

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[1] 7 U.S.C. § 210(f) (1934) ("petitioner shall not be liable for costs"); 7 U.S.C. § 499g(c) (1934) ("[a]ppellee shall not be liable for costs"); 30 U.S.C. § 32 (1934) ("costs shall not be allowed to either party"); 45 U.S.C. § 153(p) (1934) ("petitioner shall not be liable for costs"); 46 U.S.C. § 829 (1934) ("petitioner shall not be liable for costs"); 49 U.S.C. § 16(2) (1934) ("petitioner shall not be liable for costs"). Some statutes provided that "no costs" would be allowed unless certain conditions occurred. 28 U.S.C. § 821 (1934) ("no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the Patent Office"); 35 U.S.C. § 71 (1934) ("no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office"); *see also* 28 U.S.C. § 815 (1934) (plaintiff who recovers less than $500 "shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs"); 28

shifting (as opposed to the discretionary standard under the Rule).[2] The remaining statutes expressly expanded the definition of costs to include attorney's fees,[3] or did not limit cost-shifting because the statutes either overlapped with a court's discretion to award costs under Rule 54(d),[4] or had no bearing on the availability of costs to prevailing parties.[5]

As the government observes (Br. 12), the original version of Rule 54(d) before it was amended to its current form in 2007 stated that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54 (1938). Where another statute did not restrict a court's exercise of discretion under Rule 54, the statute did not displace the rule, as treatises discussing the prior version reflect. *See* 6 Moore's Federal Practice § 54.71[1], p. 54-304 (2d ed. 1996) ("[W]hen

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U.S.C. § 825 (1934) (plaintiff "shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said . . . is shown").

[2] 8 U.S.C. § 45 (1934); 15 U.S.C. § 15 (1934); 15 U.S.C. § 72 (1934); 19 U.S.C. § 274 (1934); 28 U.S.C. § 829 (1934); 28 U.S.C. § 830 (1934); 31 U.S.C. § 234 (1934); 35 U.S.C. § 69 (1934); 46 U.S.C. § 38 (1934); 46 U.S.C. § 941(c) (1934); 46 U.S.C. § 1227 (Supp. 1936); 47 U.S.C. § 206 (1934); *cf.* 33 U.S.C. § 926 (1934).

[3] 15 U.S.C. § 77k(e) (1934); 15 U.S.C. § 78i(e) (1934); 15 U.S.C. § 78r (Supp. 1936). Some statutes that mandated cost-shifting, *supra* note 2, also defined costs to include attorney's fees. *E.g.*, 46 U.S.C. § 1227 (Supp. 1936).

[4] 15 U.S.C. §§ 96, 99, 124 (1934); 28 U.S.C. § 836 (1934); 35 U.S.C. § 67 (1934).

[5] 28 U.S.C. §§ 832-835 (1934); 31 U.S.C. § 232 (1934).

permissive language is used [in a statute regarding costs] the district court may, pursuant to Rule 54(d), exercise a sound discretion relative to the allowance of costs."); 10 Charles A. Wright et al., Federal Practice and Procedure § 2670, p. 258 (3d ed. 1998) (Statutes that "are permissive in character . . . are not inconsistent with the discretion given the district court by Rule 54(d)."). The original version thus operated the same as the current version. The Rule's drafters modified the Rule in 2007 to say "provides otherwise" to clarify the original intent. The 2007 change was "stylistic only" and was made so the language would be "more easily understood." Fed. R. Civ. P. 54 advisory committee's note (2007).

3. The court of appeals at times remarked that a statute should reflect a "clear showing" of congressional intent to displace Rule 54(d). Pet. App. 8a; *id.* at 14a. Petitioner seizes on those passing statements to argue that the court applied a "clear statement rule." Pet. Br. 19; *accord* U.S. Br. 14-16. But the court throughout its opinion invoked and applied normal tools of statutory interpretation to parse Section 1692k(a)(3). Pet. App. 7a-12a. Although Congress need not use explicit language to trump Rule 54(d), the court correctly found that petitioner failed to show that the FDCPA limits a court's discretion to award costs under Rule 54. *Id.* at 14a. Moreover, the fact that Congress *does* frequently limit the operation of Rule 54(d) in explicit terms strongly undermines the notion that Congress did so here by implication.

C. The Interpretive Canons Relied on by Petitioner Do Not Support Her Reading of Section 1692k(a)(3)

1. Petitioner and the government argue that unless Section 1692k(a)(3) provides the exclusive

basis for a court to award costs, the words "and costs" would be redundant with Rule 54. Pet. Br. 7; 10-12; U.S. Br. 17-21. That "premise, however, is too strong. Statutory provisions may simply codify existing rights or powers." *Mallard v. United States District Court*, 490 U.S. 296, 307 (1989). As discussed, *supra* pp. 15-16, where Congress adds language out of an abundance of caution—here to avoid any inference that costs are not allowed to defendants who are sued wrongfully—the language is not mere surplusage. Moreover, Rule 54(d) applies only to prevailing parties, and Section 1692k(a)(3) is not so limited. Congress therefore could have meant to broaden cost-shifting to suits brought in bad faith, even though the defendant is not a prevailing party under Rule 54(d). *See Cohen v. Am. Credit Bureau, Inc.*, No. 10-5112, 2012 WL 847429, at *5 (D.N.J. Mar. 13, 2012) (Although plaintiff prevailed, "[t]his case was never about the merits. Plaintiff was offered the maximum amount she could hope to recover . . . prior to the filing of the Complaint. Even before this case was filed, the dispute disintegrated into a battle over a patently frivolous legal theory and the amount of attorney's fees that would ultimately be paid.").

In any event, "[s]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 176-77 (2012); *accord Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) ("There are times when Congress enacts provisions that are superfluous.") (quoting *Corley v. United States*, 129 S. Ct. 1558, 1572-73 (2009) (Alito, J., dissenting)); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*,

548 U.S. 291, 299 n.1 (2006) ("[T]he reference may be surplusage. . . . [I]nstances of surplusage are not unknown."); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting.").

The canon against superfluity should particularly give way when "excess language" is "hardly unusual." *Microsoft*, 131 S. Ct. at 2249. A myriad of statutes overlap with Rule 54(d). *E.g.*, 12 U.S.C. § 2607(d)(5) (Real Estate Settlement Procedures Act of 1974) ("the court may award to the prevailing party the court costs of the action"); 12 U.S.C. § 5565(b) (Consumer Financial Protection Act of 2010) ("the [Consumer Financial Protection] Bureau . . . may recover its costs in connection with prosecuting such action if [it] is the prevailing party in the action"); 15 U.S.C. § 6104(d) (Telemarketing and Consumer Fraud and Abuse Prevention Act) ("[t]he court . . . may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party"); 15 U.S.C. § 7706(f)(4) (Controlling the Assault of Non-Solicited Pornography and Marketing Act) ("[i]n the case of any successful action . . . the court, in its discretion, may award the costs of the action"); 15 U.S.C. § 7805(b)(3) (Sports Agent Responsibility and Trust Act) ("the court may award to the prevailing party costs"); 15 U.S.C. § 8131(2) (Anti-Cybersquatting Consumer Protection Act) ("[t]he court may also, in its discretion, award costs and attorneys fees to the prevailing party"); 29 U.S.C. § 431(c) (Labor-Management Reporting and Disclosure Act) ("[t]he court . . . may, in its discretion . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action"); 42 U.S.C. § 3612(p) (Fair Housing Act) ("the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and

costs"); 42 U.S.C. § 3613(c)(2) (Fair Housing Act) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs"); 47 U.S.C. § 551(f)(2) (Communications Act) ("[t]he court may award . . . other litigation costs reasonably incurred").[6]

Those examples belie petitioner's insistence that Section 1692k(a)(3) must be read to avoid a redundant authorization to award costs. "A number of statutes state simply that the court may award costs in its discretion. Such a provision is not contrary to Rule 54(d)(1) and does not displace the court's discretion under the Rule." 10 Moore's § 54.101[1][c], at 54-159. The same principle applies where the statute merely gives the court discretion to award costs in ways fully consistent with Rule 54(d). And that principle disposes of petitioner's apparent suggestion that if a statute so much as mentions the word "costs," Rule 54(d) becomes a nullity. Pet. Br. 17.

Furthermore, "the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft*, 131 S. Ct. at 2248 (quotation omitted). Section 1692k(a)(3) is redundant with a court's inherent authority to award attorney's fees and costs as a sanction. *See supra* p. 16; *Willy v. Coastal Corp.*, 503 U.S. 131, 136

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[6] Some statutes authorize an award of costs without limitation to prevailing parties. *See* 29 U.S.C. § 1132(g)(1) (ERISA) ("the court in its discretion may allow a reasonable attorney's fee and costs of action to either party"); *see also* 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C). Although petitioner notes contrary authority (Pet. Br. 17), the majority of courts to have considered the issue have held that 29 U.S.C. § 1132(g)(1) does not displace Rule 54(d). *See, e.g.*, *Williams v. Metro. Life Ins. Co.*, 609 F.3d 622, 636 (4th Cir. 2010).

n.2 (1992). Petitioner and the government wrongly contend that to "give meaning and purpose to every word," bad faith must be the "exclusive" basis for the court to act. Pet. Br. 11; *see* U.S. Br. 21 (Congress does not enact "redundant provisions that merely confer upon district courts a subset of the authority they already possess"); *id.* at 27 (same). Their logic means that Section 1692k(a)(3) prohibits *any* fee- and cost-shifting unless the "action" was "brought" in "bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). That would preclude a sanction even under a court's inherent powers in any other instance, such as if the plaintiff willfully disobeyed a court order, *Chambers*, 501 U.S. at 45, or "failed to pursue the litigation," *Piper*, 447 U.S. at 767; *see id.* ("The bad-faith exception . . . is not restricted to cases where the action is filed in bad faith."). Because that reading is implausible, redundancy in the statute cannot be avoided. "[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage—and petitioners' interpretation no more achieves that end than ours does." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012) (citations omitted).

The phrase "in bad faith and for the purpose of harassment" also contains surplusage. The government reads that language to require a showing of only bad faith. U.S. Br. 7, 8, 9, 17, 27, 28. That interpretation deprives "for the purpose of harassment" of any independent meaning. Petitioner reads the language to require a conjunctive showing of bad faith *and* a purpose to harass. Pet. Br. 7-17. That interpretation presumably renders "in bad faith" surplusage. If a party sues to harass, he acts in bad faith, and the words "in bad faith" add nothing to the statute. And if petitioner maintains that the clause

requires two different improper motives (*i.e.*, to harass and yet another bad-faith motive other than harassment), her reading utterly defeats the purpose of the provision as a sanction because the standard will rarely, if ever, be met.

Petitioner's reliance on *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004), is misplaced. There the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) provided that "any person may seek contribution . . . *during or following any civil action* under [certain sections in CERCLA]." *Id.* at 162-63. Applying the canon against superfluity and other tools of statutory construction, the Court held that "[t]o assert a contribution claim under [CERCLA], a party must satisfy the conditions" prescribed in the statute. *Id.* at 168.

By contrast, Rule 54(d) independently authorizes an award of costs to the prevailing party; Congress routinely restricts in explicit terms a court's discretion to award costs when it wants to; and Congress routinely references costs in a way that overlaps with Rule 54(d). The structure of the statute in *Cooper* also included only one direct object—a contribution right—to which the "condition" applied. For instance, a parent's statement that "after you eat your dinner, you may have milk" is more likely to mean that the parent wanted the child to eat dinner before drinking milk than had the parent mentioned cookies and milk. *See supra* pp. 17-18. As discussed, Section 1692k(a)(3) involves two objects with differing background presumptions of recovery, and the condition of bad faith and harassment is naturally understood as directed to an award of attorney's fees, not costs.

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), cited by petitioner (Br. 11) and the government (Br. 13), is even less relevant. That decision holds that Rule 54(d) does not permit a court to tax costs for expert witnesses. The Court reasoned that a contrary view would circumvent Congress's "comprehensive" itemization of taxable items under 28 U.S.C. § 1920 and the $30 per-day witness fee under 28 U.S.C. § 1821(b). *Crawford Fitting*, 482 U.S. at 440, 442. Application of Rule 54(d) here, however, does not expand the meaning of taxable costs, and Section 1692k(a)(3) is not comparable to Sections 1920 or 1821(b) in reflecting Congress's intent to confine the circumstances in which costs may be taxed. *Id.* at 440-42.

2. The government similarly errs in invoking the canon that "a precisely drawn, detailed statute preempts more general remedies." U.S. Br. 13 (quoting *Hinck v. United States*, 550 U.S. 501, 506 (2007)). Section 1692k(a)(3) does not, in the government's words, with "specificity . . . address[] cost awards to prevailing FDCPA defendants." *Id.* at 19. Section 1692k(a)(3) does not even mention prevailing defendants, but rather targets misconduct by plaintiffs. The absence of a specific reference to prevailing defendants notably contrasts with the reference to successful actions by plaintiffs in the first sentence of Subsection (a)(3).

Moreover, as discussed, specific references to a court's authority to award costs are ubiquitous in the U.S. Code, and those specific references do not override the general rule under Rule 54(d). *Supra* pp. 24-25. The specific-trumps-the-general canon ordinarily applies when two statutes conflict. Scalia & Garner, *supra*, at 183, 185; 1A Sutherland Statutory

Construction § 23:16, pp. 506-11 (7th ed. 2007); *see also Nat'l Cable & Telecomms. v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002). Here there is no conflict. By contrast, the decisions cited by the government applied the canon to conflicting limitations periods that could not both be applied in a given case. *Hinck*, 550 U.S. at 507-08; *EC Term of Years Trust v. United States*, 550 U.S. 429, 431 (2007); *Brown v. GSA*, 425 U.S. 820, 834 (1976). Those decisions also applied other tools of statutory interpretation to discern congressional intent. *Hinck*, 550 U.S. at 506; *Brown*, 425 U.S. at 829-30, 834; *EC*, 550 U.S. at 432-34.

Petitioner also errs in equating (Br. 18) Section 1692k(a)(3) to 49 U.S.C. § 60121(b), which provides that in suits under the Pipeline Safety Act "[t]he court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless." She cites no case interpreting that provision to restrict a court's discretion under Rule 54(d), and we are not aware of any. In any event, that provision refers only to costs, whereas Section 1692k(a)(3) addresses two objects with differing background presumptions. The provision also mentions "prevailing defendant[s]" and thus focuses on the same subject matter that is addressed by Rule 54(d). And the provision authorizes courts to award costs in suits that are "unreasonable, frivolous, or meritless." By contrast, the bad faith/harassment standard in Section 1692k(a)(3), if applied to limit a court's authority to award costs, would bar an award in practically every case. This Court should not infer that Congress intended such an extreme result.[7]

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[7] Petitioner also cites inapposite cases construing other statutes. Pet. Br. 17-18; *see, e.g., Gwin v. Am. River Transp. Co.*, 482 F.3d 969 (7th Cir. 2007) (46 U.S.C. § 2114(b) (2006));

D. Section 1692k(a)(3)'s Purpose and History Confirm that Prevailing Defendants May Seek Costs Under Rule 54(d)

1. The legislative history shows that Congress added the second sentence of Section 1692k(a)(3) "to protect debt collectors from nuisance lawsuits." S. Rep. No. 95-382, at 5. Congress intended this provision to afford FDCPA defendants greater protection than lenders under the Truth in Lending Act (TILA), another consumer protection statute that served as the model for parts of the FDCPA. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010). In finalizing the bill that became the FDCPA, members of Congress raised concerns that the FDCPA would result in "thousands and thousands of nuisance suits on hypertechnical supercritical violations," a phenomenon they believed occurred under TILA. Senate Comm. on Banking, Housing & Urban Affairs, *Markup Session: S. 1130—Debt Collection Legislation* 4 (July 26, 1977); *accord id.* at 3, 5, 10 (statement of Sen. Jake Garn); *see also id.* at 54, 57-58 (statements of Sens. Harrison Schmitt and Richard Lugar).

Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461 (6th Cir. 2003) (mandatory cost-shifting under 42 U.S.C. § 11113); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001) (applying *Christiansburg Garment* to 42 U.S.C. § 12205); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115 (7th Cir. 1989) (29 U.S. § 1132(g)(1); *see supra* n.6); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728 (6th Cir. 1986) (mandatory cost-shifting under 15 U.S.C. § 15(a)); *Moore v. Southtrust Corp.*, 392 F. Supp. 2d 724 (E.D. Va. 2005) (not considering whether 15 U.S.C. § 1693m(f) precludes a cost award to prevailing defendants absent bad faith, *see infra* pp. 36-37); *Barrera v. Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400 (S.D.N.Y. 2004) (applying 17 U.S.C. § 505, which defines costs to include attorney's fees).

The Chairman of the Senate Banking Committee, William Proxmire, and the chief sponsor of the FDCPA, Senator Donald Riegle, responded to those concerns by pointing to the provision at issue. Chairman Proxmire explained that the bill "permit[s] action against a harassing suit which is kind of unusual. You don't see that very often in legislation. And they specifically have language that goes right to it." *Id.* at 13; *see also id.* at 5-6 (staffer, at the chairman's direction, advised that provision "was intended to prevent the type of nuisance suits that Senator Garn refers to"). Senator Riegle similarly explained that "we have crafted" the language that became the second sentence of Section 1692k(a)(3) "to deal with the kind of problem that I think Senator Garn is concerned about." *Id.* at 7. When Senator Garn conceded that the FDCPA provision was "better than truth in lending with those provisions in it," Senator Riegle confirmed that this was the intent: "I appreciate it because we have tried hard to make it better [than TILA]." *Id.* at 14.

Other committee members raised concerns about the potential for abuse by plaintiffs. The FDCPA proponents responded that the second sentence of Section 1692k(a)(3) would stem such abuse. *Compare id.* at 17 (statement of Sen. Schmitt) (statutory damage provisions provided "incentive for the legal profession to find suits to file on behalf of their clients"); *id.* at 56-57 (statement of Sen. Richard Lugar raising concerns about breadth of FDCPA); *id.* at 19-20 (statement of Sen. Garn) (raising similar concerns), *with id.* at 17-18 (statement of Chairman Proxmire) ("Doesn't the language on harassment take care of that . . . where it says 'for purpose of harassment?' Doesn't that take care of that?"); *id.* at 57 (similar).

Thus, Congress enacted Section 1692k(a)(3) as a strongly pro-defendant provision to confer greater protection to debt collectors than lenders sued under TILA. As discussed below, prevailing TILA defendants are entitled to recover their taxable costs under Rule 54(d). *See infra* p. 35. Congress could not have intended that innocent FDCPA debt collectors would be *worse off* than prevailing lenders under TILA.

2. Petitioner's construction would perversely turn a pro-defendant provision into an extraordinary pro-plaintiff provision that makes innocent FDCPA defendants appreciably worse off than virtually every litigant in our legal system. Under petitioner's reading, debt collectors forced to undergo a trial to defend against a meritless suit may seek costs only if they incur additional expenses to prove that the plaintiff brought the suit "in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). Whether that standard requires one bad motive or two, petitioner's construction would bar prevailing debt collectors from seeking costs even for suits that are "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (recognizing distinction between suits brought in bad faith and suits that are frivolous, unreasonable, or without foundation); *Sanchez v. United Collection Bureau, Inc.*, 649 F. Supp. 2d 1374, 1382 (N.D. Ga. 2009) ("The standard for bad faith [under Section 1692k(a)(3)] is higher than the standard for mere frivolousness."). And under petitioner's reading of the statute to require a showing of harassment, costs could be awarded in only an infinitesimal set of cases that are more theoretical than real. *E.g.*, *Kahen-Kashani v. Nat'l Action Fin. Servs., Inc.*, No. 03-cv-828, 2004 WL 1040384, at *7 (W.D.N.Y. Apr. 12, 2004) (denying claim for attorney's fees because

defendant "has not provided evidence of plaintiff's bad faith (as opposed to allegation of plaintiff's counsel's bad faith) . . . and even if this Court wished to attribute counsel's conduct to the client, defendant has not proved the second element, that the suit was instituted for the purpose of harassment").

"A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg Garment*, 434 U.S. at 419. This Court should not "lightly assume[] that in enacting [the FDCPA], Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his [costs] in resisting even a groundless action unless he can show that it was brought in bad faith." *Id.* Petitioner's reading would impose on innocent FDCPA defendants a standard for cost-shifting that is even more onerous than the standard required for defendants to recover *attorney's fees* in Title VII and civil rights litigation. *Id.*; *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). The court of appeals thus correctly observed that reading the FDCPA to bar an award of costs would irrationally penalize innocent debt collectors that prevailed at trial. Pet. App. 14a. That penalty becomes all the more irrational in suits that are frivolous, unreasonable, or without foundation.

The FDCPA seeks "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Petitioner's interpretation would produce the opposite effect. As far as cost-shifting is concerned, her reading treats reputable, law-abiding debt collectors the same as debt collectors that violate the Act. *See Fair Debt Collection Practices*

Act: Hearings on S. 656, S. 918, S. 1130 and H.R. 5294 Before Subcomm. on Consumer Affairs of the S. Comm. on Banking, Housing & Urban Affairs, 95th Cong. 1 (1977) (statement of FDCPA chief sponsor Sen. Riegle) (making "emphatically clear" that he "consider[ed] the overwhelming majority of debt collectors to be honest and ethical businessmen and women"). A rule that would bar innocent debt collectors from receiving a cost award even in frivolous suits would unjustifiably disadvantage companies that petitioner's *amici* have emphasized serve an indispensable role in keeping credit flowing in our national economy:

> Consumer debt collection is critical to the functioning of the consumer credit market. By collecting delinquent debt, collectors reduce creditors' losses from non-repayment and thereby help to keep consumer credit available and potentially more affordable to consumers. Available and affordable credit is vital to millions of consumers because it makes it possible for them to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase.

Consumer Fin. Prot. Bureau, *Fair Debt Collection Practices Act* 4 (2012); *accord* Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* i (2010) ("[B]y providing compensation to creditors when consumers do not repay their debts, the debt collection system helps keep credit prices low and helps ensure that consumer credit remains widely available.").

The debt collection industry not only ensures available credit for future borrowers but also minimizes taxpayer losses. GRC, for instance, collects

publicly-financed debt such as federally-guaranteed student loans. About 85% of the $1 trillion in outstanding student loan debt in this country is either owned outright or guaranteed by the federal government. David Hogberg, *Taxpayers on Hook for $850 Billion in Student Loan Debt*, Investor's Business Daily (May 9, 2012), http://tinyurl.com/c2m45xc. Petitioner's rule would unjustifiably penalize GRC and other similarly situated law-abiding companies that play a critical role in saving taxpayer money and maintaining the viability of the credit system.

3. Petitioner's reading conflicts with Congress's treatment of other innocent defendants under the Consumer Credit Protection Act (CCPA), ch. 41, Title 15, U.S.C. The CCPA is an umbrella statute that contains eight consumer protection statutes, including the FDCPA. *See* TILA, 15 U.S.C. §§ 1601-1665e; Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j; Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f; Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x; Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f; Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r; *see also Jerman*, 130 S. Ct. at 1615.

The civil liability provisions under six of the CCPA statutes do not address the issue of a prevailing defendant's costs. Thus, financial and credit institutions that successfully defend against claims under the TILA, the Fair Credit Billing Act, and the Consumer Leasing Act may under Rule 54(d) recover their costs. *See* 15 U.S.C. § 1639b(d); *id.* § 1640(a); *id.* § 1667d. Credit reporting agencies likewise may recover their costs under Rule 54(d) when they prevail under the Fair Credit Reporting Act. 15

U.S.C. § 1681n(a), (c). Creditors, too, can recover costs under Rule 54(d) under the Equal Credit Opportunity Act. 15 U.S.C. § 1691e(d). And credit repair organizations can recover costs in suits under the Credit Repair Organizations Act. 15 U.S.C. § 1679g(a)(3).

Petitioner's reading implausibly assumes that Congress, by including costs to sanction misconduct by plaintiffs, denied cost-shifting in all other instances to prevailing FDCPA defendants and prevailing defendants under the Electronic Funds Transfer Act (EFTA). The EFTA imposes liability on financial institutions for certain transactions involving electronic banking, and the EFTA contains a provision that is virtually identical to Section 1693k(a)(3). *See* 15 U.S.C. § 1693m(f) ("On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."). It is highly dubious that Congress treated financial institutions subject to the EFTA differently than financial institutions covered by the other CCPA provisions. It is equally unlikely that Congress intended to distinguish *at all* among prevailing defendants sued under the CCPA. Indeed, because debt collection is vital to the financial health of the credit industry, Congress presumably did not single out innocent debt collectors for harsher treatment than the lenders and other institutions that debt collectors serve. The more natural inference is that

FDCPA and EFTA, like all the other CCPA statutes, coexist harmoniously with Rule 54(d).[8]

4. Petitioner and her *amici* speculate that Congress excused FDCPA plaintiffs from cost-shifting because they are likely to be "financially strapped." Pet. Br. 14-15, 22; U.S. Br. 25-26; AARP Br. 23-27. But Congress does not exempt litigants from cost-shifting based on financial hardship. To the contrary, litigants who proceed *in forma pauperis* may be required to pay costs to prevailing parties just "as in other proceedings." 28 U.S.C. § 1915(f)(1); *see Haynes v. Scott*, 116 F.3d 137, 139-40 (5th Cir. 1997); *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994).

Petitioner's theory raises other anomalies that undermine the policy basis for her construction. Petitioner lumps the FDCPA and the EFTA together (Br. 17-18, 23), yet electronic banking depositors who bring suits under the EFTA presumably are not destitute. It is also dubious that Congress favored defaulting debtors, who include those who default on *federally-guaranteed* student loans, over all other consumers who in good-faith sue under the CCPA. And as discussed, prevailing credit repair organizations may seek costs despite the fact that the consumers protected by the Credit Repair Organizations Act have, by definition, a poor "credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3). Conversely, FDCPA plaintiffs are not necessarily impoverished and may not even owe a genuine debt. Many alleged FDCPA violations involve debts arising from

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[8] Other than the EFTA, we have located no other statute containing a provision worded similarly to Section 1692k(a)(3), and petitioner and her *amici* cite none.

identity theft or fraud, problems that befall rich and poor alike. *See* AARP Br. 10-11. Similarly, a wealthy individual may make a strategic decision not to pay a particular debt—for instance, choosing to default on an "underwater" mortgage. *See, e.g.*, Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 Vand. L. Rev. 1547, 1559 (2011).

In all events, Rule 54(d) is not absolute; cost-shifting is discretionary. In enacting the FDCPA, Congress presumptively knew that Rule 54(d) permits the court to consider a losing party's inability to pay. "[A] substantiated claim of the losing party's indigency may justify a reduction or denial of costs to the prevailing party." 10 Moore's § 54.101[1][b], at 54-157. Although petitioner could have sought a waiver or reduction of any cost award, *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004), she never asked for such relief. *Cf.* U.S. Br. 26 (relying on petitioner's lack of income). Petitioner urges a rigid rule that would unjustifiably excuse financially capable plaintiffs from the normal cost-shifting rule that applies to *in forma pauperis* litigants, consumers, debtors, and virtually all other citizens in this country who are subject to Rule 54(d).

E. Application of Rule 54(d) Does Not Unduly Chill Enforcement of the FDCPA

1. Petitioner and her *amici* argue that applying the normal presumption for cost-shifting under Rule 54 would impermissibly "chill" meritorious suits. Pet. Br. 15, 21-22; U.S. Br. 25-26; AARP Br. 23-24. But their logic also presumes that Congress wanted to encourage "frivolous, unreasonable, [and] groundless" suits, as long as they were not brought in bad

faith and/or to harass. *Christiansburg Garment*, 434 U.S. at 422. Petitioner envisions a Congress that intended to incentivize FDCPA plaintiffs not only by providing for actual damages, statutory damages, attorney's fees and cost-shifting, but also by denying to innocent debt collectors even the modicum benefit of *seeking* cost-shifting after they undergo trial to disprove meritless suits. That scheme contains no "balance" (U.S. Br. 21, 22, 28) at all. Instead, plaintiffs would have a free pass to file frivolous lawsuits, facing only the small risk that the debt collector, after prevailing at trial, is in the position to incur even further expenses to prove that the suit "was brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). If petitioner and her *amici* believe that innocent debt collectors (and apparently innocent banks making electronic transfers) should be treated appreciably worse off than virtually all litigants that are faced with meritless suits, they should direct their policy arguments to Congress. *Jerman*, 130 S. Ct. at 1624.

The contention that FDCPA suits should be further incentivized by eliminating the normal operation of Rule 54(d) is unsound. Congress encouraged private enforcement of the FDCPA by enacting a generous civil liability provision for plaintiffs who *win* their suits. Congress incentivized FDCPA suits by mandating attorney's fee shifting for prevailing plaintiffs and statutory damages. 15 U.S.C. § 1692k(a). Given the absence of an express prohibition against cost-shifting when a plaintiff *loses* her suit, this Court should not lightly infer that Congress intended to further encourage FDCPA suits (both frivolous and non-frivolous alike) by exempting losing plaintiffs from cost-shifting.

If anything, the increasing volume of private FDCPA suits suggests no further encouragement is needed. More than a decade ago the Seventh Circuit commented that "FDCPA cases [are] flooding this circuit." *Sanders v. Jackson*, 209 F.3d 998, 1004 (7th Cir. 2000); *see also Cohen*, 2012 WL 847429, at *1 n.1 (district of New Jersey has seen "a consistent increase in the number of FDCPA filings from 2008 through 2011 . . . [with] 182 FDCPA cases filed in 2008; 238 cases filed in 2009; 364 cases filed in 2010; and 683 cases filed in 2011"); *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006) ("A cursory examination of the court's docket demonstrates an exponential growth in litigation under the statute."), *rev'd on other grounds*, 516 F.3d 85 (2d Cir. 2008). The number of FDCPA lawsuits nationwide has increased every year and ballooned nearly 300% from 3,215 in 2005 to 12,018 in 2011.[9]

Application of Rule 54(d) would not impermissibly discourage suits under the FDCPA—at least any more than application of the rule does with respect to other suits under the CCPA. The threat of a cost award under Rule 54(d) apparently has not discouraged suits in the district court in Colorado, where petitioner filed this suit. That court awarded costs to prevailing defendants not only in this case, but also in at least three FDCPA cases in 2008, at least one

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[9] Collections Recon, *2011 Litigation Statistics Revised Upward, FDCPA Suits Surpass 12,000* (Feb. 24, 2012), http://www.collectionsrecon.com/latestnews/collection_news/2011-litigation-statistics-revised-upward-fdcpa-suits-surpass-12000/(2012 FDCPA statistics); Collections Recon, *FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap* (Jan. 12, 2012), http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-full-year-2011-recap/.

case in 2009, and at least one other in 2011.[10] Yet the number of FDCPA lawsuits filed in that district continues to climb. Court records on PACER show that plaintiffs filed 296 FDCPA lawsuits in 2009, 484 in 2010, and 645 suits in 2011. Petitioner's trial attorney filed 194 FDCPA lawsuits in 2009, 268 suits in 2010, and 365 suits in 2011—a lawsuit-per-day, including weekends and holidays.

Nor has the Tenth Circuit's decision below chilled private FDCPA enforcement in Colorado. Following the court of appeals' decision in December 2011, plaintiffs filed 460 new FDCPA lawsuits in the District of Colorado between January 1 and August 30, 2012, which is *ahead* of the pace in 2011, when Colorado was among the top FDCPA filing districts in the country. Petitioner's trial attorney alone has filed 242 lawsuits so far in 2012.

Courts have further observed that "FDCPA cases appear to be much more about attorney's fees than the prosecution of consumer rights." *Berther v. TSYS Total Debt Mgmt., Inc.*, No. 06-C-293, 2007 WL 1795472, at *4 (E.D. Wis. June 19, 2007). "Quite frequently, the plaintiffs are mere figureheads while the driving force[s] behind these cases are the attorneys and their quest for attorney's fees." *Id.* at *2; *accord, e.g.*, *Miller v. Javitch, Block & Rathbone*, 534 F. Supp. 2d 772, 778-79 (S.D. Ohio 2008); *Jacobson*, 434 F. Supp. 2d at 138. "The history of FDCPA litigation shows that most cases have resulted in limited

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[10] *Dillard-Crowe v. Aurora Loan Services, LLC*, No. 07-cv-1987; *Dillard-Crowe v. Citibank N.A.*, No. 07-cv-2172; *Guarneros v. Deutsche Bank Trust Co. Americas*, No. 08-cv-1094; *Holland v. Standley and Assocs., LLC*, No. 09-cv-1474; *Kelly v. Wolpoff & Abramson, LLP*, 07-cv-91. The cost award in this case was entered on July 15, 2010. Pet. App. 28a-29a.

recoveries for plaintiffs and hefty fees for their attorneys." *Sanders*, 209 F.3d at 1004; *see also, e.g.*, *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) ("The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation.") (quotation omitted).

As Justices Kennedy and Alito have remarked, "[a] collateral effect of these statutes may be to create incentives to file lawsuits even where no actual harm has occurred." *Jerman*, 130 S. Ct. at 1631 (Kennedy, J., dissenting, joined by Alito, J.). The FDCPA creates a "troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Id.* The aggressive prosecution of meritless FDCPA claims, motivated by attorney's fees, led the Seventh Circuit to conclude that the "all-too-common abuse of the class action as a device for forcing the settlement of meritless [FDCPA] claims . . . is thus a mirror image of the abusive tactics of debt collectors at which the statute is aimed." *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

2. Both petitioner and the government observe (Pet. Br. 15; U.S. Br. 3) that FDCPA defendants sometimes prevail in litigation under the Act's *bona fide* error defense, which precludes liability for unintentional violations of the Act where the debt collector maintains "procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). But because Congress immunized such debt collectors from liability, they are entitled to seek cost-shifting under Rule 54(d) like any other prevailing defendant.

Moreover, the argument has no bearing in cases such as this one, where the debt collector prevails not because of any defense, but because the debt collector did not violate the FDCPA in the first instance.

Even where the *bona fide* error defense is dispositive, district courts may exercise their discretion under Rule 54(d) and take the nature of the victory into account in deciding whether and to what extent to award costs. Petitioner hypothesizes a case where a plaintiff "successfully prove[s] that the defendant violated the FDCPA but nonetheless lose[s] her case, based on facts known only to the defendant prior to suit." Pet. Br. 15. The mere possibility of such a case—and petitioner cites no such case—does not warrant a rule that renders district courts powerless to award costs under *any* circumstances short of bad faith and harassment, including in cases that are frivolous, unreasonable, or groundless.

II. GRC WAS ENTITLED TO COSTS UNDER FEDERAL RULE OF CIVIL PROCEDURE 68

The district court held that Federal Rule of Civil Procedure 68 independently justified the award of costs because petitioner lost on the merits after rejecting GRC's offer of judgment. Pet. App. 29a. The court of appeals, however, correctly observed (Pet. App. 14a-15a) that *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), precludes the application of Rule 68 where the defendant wins outright. The net effect of petitioner's position, then, is that debt collectors should face FDCPA suits with both hands tied behind their backs, *i.e.*, with neither Rule 54(d) nor Rule 68 serving as a backstop against frivolous suits that burden law-abiding defendants and the judicial system. Petitioner's position would

disable debt collectors from recovering costs no matter how frivolous the case or how generous a debt collector's settlement offer.

Petitioner's position would give plaintiffs a cost-free pass to press frivolous litigation and reject reasonable settlement offers (as long as the suit was not filed for improper purposes). Here, petitioner did not so much as bother to respond to GRC's settlement offer under Rule 68 for $1,500 (150% of the maximum statutory damages) *plus* petitioner's then-accrued attorney's fees and costs. Petitioner's position would allow that scenario to repeat itself without consequences even in the most frivolous of suits.

As explained above, normal rules of statutory construction dictate that the FDCPA's sanction against bad faith plaintiffs does not strip courts of their presumptive authority to award costs to prevailing defendants. But if petitioner were somehow correct, this Court should not adopt petitioner's reading without also overruling *Delta* and putting an end to a system that wastes judicial resources and unjustifiably burdens law-abiding defendants that face meritless suits under the FDCPA.[11]

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[11] Rule 68 was pressed below in both courts, and this Court may consider Rule 68 as an alternative grounds for affirmance even though the opposition to the petition did not raise the issue. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178-79 (2009). This Court may address any issue "fairly included" within the question presented. Sup. Ct. R. 14.1. Here, "[t]he question presented is whether a prevailing defendant in an FDCPA case may be awarded costs where the lawsuit was not 'brought in bad faith and for the purpose of harassment.'" Pet. Br. i. Whether costs can be awarded under Rule 68 is fairly included within that question.

A. Rule 68 Requires Petitioner to Pay GRC's Post-Offer Costs

Rule 68(d) provides that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Rule 68 applies to all civil cases in federal court and, in contrast to Rule 54(d), does not contain any exception for statutes that "provide otherwise." *See* 12 Charles A. Wright et al., Federal Practice and Procedure § 3001.1, p. 76 (2d ed. 1997) ("Rule 68 contains no exclusions on its face that forbid its application in certain types of cases."). Thus, had petitioner prevailed and been awarded the statutory maximum of $1,000, *i.e.* $500 less than GRC's $1,500 offer of judgment, Rule 68 would have required petitioner to pay GRC's post-offer costs.

Here, petitioner lost and obtained an adverse judgment that was less favorable than GRC's unaccepted offer of $1,500. JA 34-36. Accordingly, if Rule 68 applies where the plaintiff loses, Rule 68 required petitioner to pay the costs that GRC incurred after making the offer, which include all of the costs the district court awarded. Thus, the district court relied on Rule 68 to award costs. Pet App. 29a.

B. *Delta* Should Be Overruled

1. In *Delta*, a bare majority of the Court concluded that Rule 68 was "simply inapplicable" to cases where the defendant prevails. 450 U.S. at 352. The majority reasoned that the textual condition that triggers the Rule—"the judgment obtained by the offeree is not more favorable than the offer"—would "not normally be read by a lawyer to describe a

judgment in favor of the other party." *Id.* at 351.[12] As then-Justice Rehnquist explained in dissent, however, this interpretation illogically assumes that the drafters intended to place "a plaintiff who has refused an offer under Rule 68 and then has a 'take nothing' judgment entered against her . . . in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68." 450 U.S. at 375 (Rehnquist, J., dissenting, joined by Burger, C.J., and Stewart, J.). While Justice Powell concurred on the ground that the offer in that case did not comply with Rule 68, he "agree[d] with most of the views expressed in the dissenting opinion of Justice Rehnquist, and d[id] not agree with the Court's reading of Rule 68," calling it "anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*." *Id.* at 362 (Powell, J., concurring in the result).

In evaluating whether to overrule existing precedent, this Court considers "workability, . . . the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009); *cf. Pearson v. Callahan*, 555 U.S. 223, 233 (2009) ("Revisiting precedent is particularly appro-

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[12] At the time of *Delta*, Rule 68 stated: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." 450 U.S. at 348 n.1. Rule 68(d) now provides that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."

priate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."). These factors strongly support overturning *Delta*.

A plaintiff "obtain[s]" a judgment whether it favors the plaintiff or the defendant. A plaintiff initiates and prosecutes litigation, the ultimate result of which is a judgment, defined as "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). An appealable judgment is "obtained" through those efforts regardless of whether the judgment is ultimately favorable or adverse.

Dictionaries equate the word "obtain" with "get" or "receive."[13] It would be common usage to say a student "gets," "receives," or "obtains" a grade at the end of a semester regardless of whether that grade is an A or an F. So too, a litigant "gets," "receives," or "obtains" a judgment as the end result of litigation that she has commenced and pressed, irrespective of whether that judgment is the one she wanted. A plaintiff who obtains a judgment against her can appeal that judgment, as happened here. Not surprisingly, courts commonly refer to an adverse judg-

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[13] *See, e.g.*, The Compact Edition of the Oxford English Dictionary at 1968 ("[t]o come into the possession of," "to procure," "to acquire, get"); Cambridge Dictionary Online, http://dictionary.cambridge.org/dictionary/american-english/obtain?q=obtain ("to get something, esp. by a planned effort"); Roget's International Thesaurus 479.6 ("receive, get, gain, secure, have, come by, be in receipt of, be on the receiving end; obtain, acquire").

ment as having been "obtained" by the losing party, including the plaintiff.[14]

"Rule 68, when construed to include a traditional 'take nothing' judgment, see, Appendix to Fed. Rules Civ. Proc., [Forms 70 and 71], as well as a judgment in favor of the plaintiff but less than the amount of the offer, thus fits with the remaining parts of the Federal Rules of Civil Procedure pertaining to judgments and orders in a manner in which the drafters of the Rule surely must have intended." *Delta*, 450 U.S. at 371 (Rehnquist, J., dissenting). In contrast, "the language of these Rules must be twisted virtually beyond recognition, and that of Rule 68 parsed virtually out of existence, to say that the latter Rule does not apply in a situation such as this simply because the [defendant] prevailed." *Id.* at 374.

The *Delta* majority also relied on language describing an offer as one where "the defendant offer[s] to allow judgment to be *taken against him*." Fed. R. Civ. P. 68(a) (1980); *see* 450 U.S. at 351. "Because the Rule obviously contemplates that a 'judgment taken' against a defendant is one favorable

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[14] *See, e.g., Amendola v. Sec'y, Dep't of Health & Human Services*, 989 F.2d 1180, 1184 (Fed. Cir. 1993) ("upon obtaining an unfavorable judgment"); *Marcus v. Sullivan*, 926 F.2d 604, 615 (7th Cir. 1991) ("claimants who obtained final adverse judgments from the courts"); *Riley Hosp. & Benev. Ass'n v. Bowen*, 804 F.2d 302, 306 (5th Cir. 1986) ("[a]fter obtaining an adverse judgment"); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986) (petitioner could have "obtained a final judgment, appealable if adverse, on his petition"); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1236 (9th Cir. 2006) (Fisher, J., concurring) (criticizing majority's requirement that plaintiff "obtain a 'final' adverse judgment [overseas] before the majority will consider this case ripe").

to the plaintiff," the majority reasoned, "it follows that a judgment 'obtained' by the plaintiff is also a favorable one." *Id.* While the logic of that syllogism was dubious to begin with, the words "taken against him" are no longer in Rule 68. The absence of those words further undermines the basis for the majority's conclusion. *See* Fed. R. Civ. P. 68(a) (providing instead that a defendant may "offer to allow judgment on specified terms").

The lower courts have puzzled over *Delta*'s "utterly irrational" and "seemingly absurd" rule that "penalizes the defendant for winning the case." *Sparaco v. Lawler, Matusky & Skelly*, 201 F.R.D. 335, 336 (S.D.N.Y. 2001); *see also Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 295 n.1 (6th Cir. 1989) ("*Delta* does create the anomaly that a small judgment may be much more adverse to a plaintiff who has received a Rule 68 offer than a judgment for defendant under which the plaintiff takes nothing."); *Danese v. City of Roseville*, 757 F. Supp. 827, 831 n.4 (E.D. Mich. 1991) (agreeing with the *Delta* dissent that "the majority's construction has [a] peculiar and anomalous effect"). Commentators likewise have questioned the decision's rationality. *See, e.g.*, Note, Delta Air Lines, Inc. v. August: *The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 636 n.169 (1982) (collecting critical scholarship and noting that "[c]riticism of the holding in *Delta* has been swift and uniform").

2. *Delta* conflicts with Rule 68's "clear policy . . . favoring settlement of all lawsuits." *Marek v. Chesny*, 473 U.S. 1, 10 (1985). As Justice Rehnquist explained, "provisions such as Rule 68 designed to promote settlement, rather than litigation, of claims [are] bound to make a plaintiff take a look at his 'hole

card.' By the same token, the availability of such a procedure is bound to make the defendant take a look at *his* 'hole card' in order to make certain that he is using every means available to both avoid costly protracted litigation and possible loss of the case if it goes to trial." *Delta*, 450 U.S. at 380 (Rehnquist, J., dissenting). "[R]equir[ing] plaintiffs to 'think very hard' about whether continued litigation is worthwhile . . . is precisely what Rule 68 contemplates." *Marek*, 473 U.S. at 11.

That purpose is furthered by applying cost-shifting to all judgments that are not more favorable than an unaccepted offer, while it is frustrated by arbitrarily denying the benefit of the rule to the most deserving defendants, those who prevail entirely. *Delta* is unworkable because it renders Rule 68 a nullity in cases such as this one where the policies behind the Rule have their greatest force. *Delta* guts an important tool that would otherwise promote settlement and relieve crowded court dockets of cases that should be resolved short of full litigation. This Court should abandon a distinction so inimical to the manifest purpose underlying the rule.

3. The majority speculated that allowing a defense victory to trigger Rule 68 could encourage defendants to make offers of "one penny" to collect a mandatory costs award should they prevail. 450 U.S. at 353 & n.11. Such "policy considerations," however, are unavailing "when the intent of the drafters of the Rule is as plain as it is here." *Id.* at 375 (Rehnquist, J., dissenting). In any event, the majority's concern is misplaced. When a defendant makes a Rule 68 offer, the outcome of the litigation is unknown. A defendant has every incentive to make an offer that maximizes the chances of triggering cost-shifting un-

der either scenario in which Rule 68(d) can operate: a defense victory, or a judgment for a plaintiff in an amount less than the offer. A defendant offering one penny all but ensures that it will not receive its costs unless there is certainty of an outright win. In short, "there is a built-in deterrent against unreasonably low offers as such offers increase the likelihood that the offeree will do better by going to trial, rendering the offeror ineligible for costs." *Kikuchi v. Brown*, 130 P.3d 1069, 1074 (Haw. Ct. App. 2006) (construing state's version of Rule 68 to apply to defense judgments despite sham offer concerns).

In this case, GRC's offer early in the case of $1,500 (150% of the maximum statutory damages) *plus* petitioner's then-accrued attorney's fees and costs was plainly not a sham. The possibility of sham offers in other cases does not justify categorically shutting out prevailing defendants like GRC from the benefit of Rule 68. If sham offers materialize in particular cases, the lower courts are well equipped to respond. For example, some state courts require offers to be reasonable and in good faith under state counterparts to Rule 68. *See Beal v. McGuire*, 216 P.3d 1154, 1178 (Alaska 2009); *Warr v. Williamson*, 195 S.W.3d 903, 907 (Ark. 2004); *Hubbard v. Kaiser-Francis Oil Co.*, 256 P.3d 69, 75 (Okla. 2011); *cf. Delta*, 450 U.S. at 355 (noting that the court below had "resolved the problem [of sham offers] by holding that only reasonable offers trigger the operation of Rule 68").

4. Observing that Rule 68 was originally modeled after state cost-shifting statutes, the majority relied on pre-1937 practice under state counterparts to Rule 68. *See Delta*, 450 U.S. at 356-58. Even then, "the state cases cited by the Court" did not support the

result the majority reached because they "d[id] not address the situation in which a defendant has prevailed on the merits." *Id.* at 373-74 (Rehnquist, J., dissenting). Today, a survey of modern state court practice demonstrates more clearly than ever the wrong turn the majority took in *Delta*.

In at least seventeen States, a prevailing defendant is entitled to recover costs after having made an unaccepted offer of judgment. Some States have reached this result through judicial decisions interpreting language substantially similar to Federal Rule of Civil Procedure 68(d) and reaching the opposite outcome from *Delta*, sometimes with explicit criticism of that decision. *See Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc.*, 743 S.W.2d 804, 805 (Ark. 1988) (noting "flaws in the *Delta Air Lines* reasoning" and "absurd results"); *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983) (rejecting *Delta* "because such reasoning leads to an anomalous result"); *see also Kikuchi*, 130 P.3d at 1074; *Divine v. Groshong*, 679 P.2d 700, 711 (Kan. 1984); *Griffis v. Lazarovich*, 595 S.E.2d 797, 802 (N.C. Ct. App. 2004); *Hubbard*, 256 P.3d at 72-73; *Estep v. Hamilton*, 201 P.3d 331, 338 (Wash. Ct. App. 2008).

In other States, the applicable statute or rule is phrased differently than federal Rule 68 in a way that definitively forecloses the illogical outcome of *Delta*. *See, e.g.*, Alaska Stat. § 09.30.065(a); Ariz. R. Civ. Proc. 68(g); Cal. Civ. Proc. Code § 998(c)(1); Colo. Rev. Stat. § 13-17-202(1)(a); Conn. Gen. Stat. § 52-195(b); Fla. Stat. § 768.79(1); Ga. Code Ann. § 9-11-68(b); Mich. Ct. R. 2.405(D); Minn. R. Civ. Proc. 68.03(b); Wis. Stat. § 807.01(1); Wyo. Stat. Ann. § 1-10-103. That so many States disagree with *Delta*'s

anomalous and counterintuitive rule is a clear signal that reexamination of that rule is warranted.

C. No Countervailing Considerations Support Retaining *Delta*

Overruling *Delta* and applying Rule 68 according to its plain terms would not "upset expectations." *See Montejo*, 556 U.S. at 793. Like any "rules governing procedures . . . in the trial courts," *Delta* "does not affect the way in which parties order their affairs." *Pearson*, 555 U.S. at 233. Plaintiffs who lose already face presumptive liability for their opponent's costs under Rule 54(d). Overruling *Delta* would simply make that liability mandatory rather than presumptive in the subset of cases where the defendant previously offered judgment under Rule 68. It is doubtful that many plaintiffs with pending civil cases based their decision to file suit on the expectation that *if* the defendant makes an offer of judgment, *if* the plaintiff rejects that offer, and *if* the plaintiff ultimately loses, the resulting costs liability will be only presumptive.

Moreover, costs recoverable under Rule 68(d) generally are limited to those taxable under 28 U.S.C. § 1920, which are "modest in scope." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2006 (2012). In particular, overruling *Delta* would not impose on losing plaintiffs any new liability for defendants' attorney's fees. To be sure, the post-offer costs that are shifted under Rule 68(d) may include attorney's fees under statutes that—unlike the FDCPA—provide for fee-shifting by making attorney's fees "properly awardable" as part of costs. *Marek*, 473 U.S. at 9-11; *cf.* 15 U.S.C. § 1692k(a)(3) (referring to costs and attorney's fees separately). Where *Marek*

applies, if a plaintiff prevails but recovers less than the defendant offered, Rule 68(d) requires the plaintiff to bear his own post-offer attorney's fees even though he would ordinarily be entitled, as a prevailing party under a fee-shifting statute, to recover those fees.

Rule 68(d) never functions as the original source of a right to recover attorney's fees; rather, such a right must be found in the underlying statute. Whatever right a prevailing defendant may have to recover its attorney's fees exists with or without *Delta*. In many instances, a prevailing defendant's recovery of attorney's fees is subject to statutory or judicially imposed limitations. *See, e.g., Christiansburg Garment*, 434 U.S. at 422 (prevailing defendant in Title VII action cannot recover attorney's fees "unless a court finds that the claim was frivolous, unreasonable, or groundless" or the plaintiff acted in bad faith); *Hughes*, 449 U.S. at 14 (extending same standard to fee-shifting under 42 U.S.C. § 1983). Those limitations apply under Rule 68. *See, e.g., Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1031-32 (9th Cir. 2003); *Crossman v. Marcoccio*, 806 F.2d 329, 333-34 (1st Cir. 1986); *see also Le v. Univ. of Pa.*, 321 F.3d 403, 410-11 (3d Cir. 2003). If this Court overrules *Delta* and restores Rule 68 to be fully operable as the drafters of the Rule plainly intended, a defendant's entitlement to attorney's fees would remain subject to such limitations.

Accordingly, if this Court concludes that prevailing FDCPA defendants may not seek costs under Rule 54(d), the Court should overrule *Delta* and hold that Rule 68 required petitioner to pay GRC its post-offer costs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ERIC D. REICIN
Deputy General Counsel
SALLIE MAE, INC.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 984-6528

KEVIN T. DREYER
Associate General Counsel
SALLIE MAE, INC.
11501 Northlake Drive
Cincinnati, OH 45249
(513) 605-7551

LISA S. BLATT
Counsel of Record
ROBERT J. KATERBERG
ANTHONY J. FRANZE
DIRK C. PHILLIPS
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

ADAM L. PLOTKIN
STEVEN J. WIENCZKOWSKI
621 17th Street
Suite 1800
Denver, CO 80211
(303) 296-3566

Counsel for Respondent

September 10, 2012

APPENDIX

APPENDIX: STATUTES AND RULES INVOLVED

The civil liability provision of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k, states:

> (a) **Amount of damages.** Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure;
>
> (2)
>
> (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) **Factors considered by court.** In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) **Intent.** A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) **Jurisdiction.** An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) **Advisory opinions of Bureau.** No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Federal Rule of Civil Procedure 54 ("Judgment; Costs") states:

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) **Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) **Costs; Attorney's Fees.**

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. §1927.

Federal Rule of Civil Procedure 68 ("Offer of Judgment") states:

> (a) **Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
>
> (b) **Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
>
> (c) **Offer After Liability is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
>
> (d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

REPLY BRIEF

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Supreme Court of the United States

OLIVEA MARX,
Petitioner,

v.

GENERAL REVENUE CORPORATION,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Counsel for Petitioner

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INTRODUCTION

The question in this case is whether § 1692k(a)(3) of the Fair Debt Collection Practices Act (FDCPA) "provides otherwise" than Federal Rule of Civil Procedure 54(d), by awarding costs to prevailing defendants only in cases brought in bad faith and for the purpose of harassment. Answering this question yes, Ms. Marx's reading of § 1692k(a)(3) gives meaning and effect to each word in the relevant sentence. In contrast, respondent General Revenue Corporation (GRC) concedes that, under its reading, the sentence would have exactly the same meaning if the words "and costs" were omitted.

As an alternative ground for affirmance, GRC asks this Court to do something extraordinary: overturn a 31-year-old precedent resolving a question about Rule 68 that was not briefed below, was not mentioned in the opposition to the petition for certiorari, and is not fairly encompassed in the question presented in the petition. This case presents no opportunity for the Court to revisit the Rule 68 question.

ARGUMENT

I. Section 1692k(a)(3) Provides Otherwise than Rule 54(d).

This Court has "restated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The FDCPA states that "upon a finding that an action was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3). This provision conditions an award of costs to a prevailing defendant, like an award of fees, on a

finding of bad faith and intent to harass. "To read it otherwise is to suggest Congress passed a statute permitting a cost award conditioned upon a finding of bad faith, but intended to permit cost awards without a finding of bad faith." Pet. App. 25a (dissent).

A. GRC declares (at 14) that the "principal focus" of § 1692k(a)(3) is awarding attorney's fees, and that the "passing reference" to "costs" does no more than "confirm" that defendants can seek costs under existing law. The text itself belies GRC's claim, as each of the two sentences of § 1692k(a)(3) focuses equally on fees and on costs. And GRC fails to explain why, if Congress simply wanted to "confirm" that a prevailing defendant may always seek costs, the statutory text provides for costs *only* in cases of bad faith and harassment.

Unhappy with the text that Congress enacted, GRC tries to bolster its argument by rewriting the provision to replace "and" with "in addition to." Specifically, GRC suggests (at 15) that the clause "the court may award to the defendant attorney's fees . . . and costs" means that "the court may award to the defendant attorney's fees . . . [in addition to] costs." "And" and "in addition to" are not, however, interchangeable, as the latter conveys the idea of adding onto an existing object. *See, e.g.*, Dictionary.com, http://dictionary.reference.com/browse/in+addition+to (defining "in addition to" as "as well as; besides").

For example, in the Equal Access to Justice Act (EAJA), after providing that costs "may be awarded to the prevailing party" in an action by or against the United States, 28 U.S.C. § 2412(a), Congress used "in addition to" to address fee awards:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party

> other than the United States fees and other expenses, *in addition to* any costs awarded pursuant to subsection (a), incurred by that party in any civil action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id. § 2412(d) (emphasis added). Thus, an award of EAJA fees depends on the conditions stated in the final clause ("unless . . . the position of the United States was substantially unjustified or . . ."). But as indicated by the words "in addition to," a cost award is not subject to the condition. *See, e.g., Neal & Co., Inc. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997) ("[S]ections 2412(a)(1) and 2412(d)(1)(A) clearly treat costs differently from fees.").

In the FDCPA, Congress could have drafted a similar provision, conditioning fees—but not costs—on the satisfaction of a condition. Congress did not do so. Instead, it crafted a sentence in which the condition applies equally to both objects, fees and costs. The sentence structure affords no other reading, and, other than by rewriting the sentence, GRC does not suggest one.

GRC argues (at 15) that Congress may have included "and costs" out of an "abundance of caution" because, otherwise, "doubt might have existed from a lack of parallelism between the first and second sentences" of § 1692k(a)(3). Such doubt would have been unwarranted, however, because "[t]he fact that a particular statute mandates costs to a prevailing plaintiff does not imply that the court's discretion to award costs to the prevailing defendant is in any way curtailed." 10 Fern Smith, *Moore's Federal Practice* ¶ 54.101[1][c] (3d ed. 1997). *See, e.g., O'Ferral v. Trebol Motors Corp.*, 45 F.3d 561, 564 (1st Cir.

1995) (RICO provision for mandatory cost award to prevailing plaintiff "does not affect an award of defense costs—which RICO does not address"); *Lewis v. Pennington*, 400 F.2d 806, 819 (6th Cir. 1968) (although Clayton Act mandates cost award to prevailing plaintiff, court retains discretion to award costs in cases where plaintiff does not prevail).

In any event, maintaining "parallelism" plainly did not motivate Congress to insert the words "and costs" into the second sentence of § 1692k(a)(3) because, even with "costs" in each sentence, the first and second sentences of § 1692k(a)(3) are *not* parallel. The first sentence addresses a *mandatory* award that is *not* subject to a condition, while the second addresses a *discretionary* award that *is* subject to a condition. *See* Pet. Br. 2. The sentence structure and wording are likewise different. *Compare*, *e.g.*, "costs, together with a reasonable attorney's fee," *with* "attorney's fees reasonable in relation to the work expended and costs." In short, "parallelism" could not have been Congress's concern because in neither substance nor wording are the two sentences parallel.

B. GRC does not contest that its reading, unlike Ms. Marx's reading, fails to give effect to each word in § 1692k(a)(3). Instead, GRC argues (at 17-18) that the superfluity inherent in its reading makes sense in context. The context it offers, however, runs far afield, looking to spoken conversation between a mother and her child. Of course, spoken language is often imprecise and is not subject to an interpretative rule with respect to avoiding superfluity. *See* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 Geo. Wash. L. Rev. 309, 347 (2001) ("The techniques of understanding natural language in ordinary conversation

cannot all be uncritically imported into the task of statutory interpretation.").

Even putting aside the critical distinction between casual speech and statutory text, GRC's examples fail to prove its point. GRC posits (at 17-18, 27) as its primary counterexample that the sentence "if you eat your dinner, you may have milk and cookies," when spoken by a mother to her child, cannot mean that if the child does not eat dinner, he cannot have milk because, GRC says, "children presumptively are expected to drink milk, before, during, and after dinner." In this way, GRC creates a presumption (that a mother will give her child milk regardless of whether he eats his dinner) from which its conclusion follows (that the mother will give her child milk regardless of whether he eats his dinner). In some households, however, the presumption is not that the child will always drink milk.[1] In such a household, GRC's hypothetical mother might be offering milk as a post-dinner treat on the condition that the child eats dinner. Thus, the meaning of the sentence depends on the background presumption.

Here, the background presumption is not that costs (GRC's milk) will always be awarded, but that costs will be awarded *unless a statute provides otherwise*. When a statute does "provide otherwise," the presumption does not apply, as Rule 54(d) plainly states. Accordingly, even if Congress legislated judicial authority as a mother speaks to a child, the "context" of this case does not support reading § 1692k(a)(3) to render "and costs" superfluous.

---

[1] *See, e.g.*, U. Mich. Health System, *Feeding Your Baby and Toddler*, at http://www.med.umich.edu/yourchild/topics/feedbaby.htm (Sept. 2010) ("Preschoolers should not drink more than a maximum of 16-24 ounces (2-3 cups) of milk each day.").

GRC contends (at 24) that, because many statutes provide for a discretionary award of costs, "the canon against superfluity should . . . give way." GRC's reliance on statutes providing that a court "may" award costs to the prevailing party is misplaced. Virtually all of these statutes "provide otherwise" than Rule 54(d) by providing for an award of attorney's fees in addition to costs (sometimes stated as "part of costs"), and Congress has enacted such statutes dozens of times without specifying the reason for including "costs." Nonetheless, regardless of whether the reference to "costs" in these statutory provisions is duplicative of Rule 54(d) to the extent that the provisions do little more in regard to costs than create a statutory basis for the award provided for in Rule 54(d), GRC points to no statute that poses the conundrum that GRC faces with respect to § 1692k(a)(3): While Congress in the cited statutes essentially codified Rule 54(d)'s costs standard in its entirety, Congress did not do so in § 1692k(a)(3). Instead, it codified a *subset* of the Rule's provision for costs—a strange choice if Congress wanted Rule 54(d)'s standard to apply in *every* FDCPA case.

Further, to read statutory language as duplicative of existing authority or superfluous given other statutory text may be warranted where the provision at issue is not reasonably susceptible of another construction. GRC offers no authority, however, to support doing so when the provision is susceptible of another reading that gives effect to every word. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (noting "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute" (citation omitted)); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (adopting reading that is "the only one that makes sense of each phrase in" statutory provision). Moreover, the question

here is not whether provisions in other statutes that merely reiterate Rule 54(d) are unnecessary. The question is whether a provision that states an alternative rule is given effect.

Trying a different approach to support superfluity, GRC suggests (at 16, 25) that the *entirety* of the second sentence of § 1692k(a)(3) is "redundant with a court's inherent authority" to award fees as a sanction for bad-faith conduct and a court's "rule-based authority respecting cost-shifting." It is unclear how that suggestion helps to discern the function of "and costs" in the sentence, and the recognition that courts' authority to award costs is "rule-based" begs the question whether § 1692k(a)(3) "provides otherwise" than the rule. GRC also fails to explain how a provision that ties an award of costs to bad faith and an intent to harass simply "confirms" a rule-based authority that is not so tied. Furthermore, to the extent that GRC is arguing that § 1692k(a)(3) is entirely superfluous with respect to an award of costs in cases brought in bad faith and to harass, that argument would apply equally to an award of fees—which all parties agree § 1692k(a)(3) authorizes in cases brought in bad faith and to harass. GRC's argument thus turns the superfluity rule on its head. Unlike GRC's reading, which renders the sentence entirely superfluous, Ms. Marx's reading gives the sentence operative effect, limiting the circumstances in which a prevailing defendant may be awarded costs.

GRC next argues (at 26) that the reading advanced by Ms. Marx and the Solicitor General would mean that § 1692k(a)(3) overrides the courts' inherent power to sanction willful disobedience of a court order. GRC is incorrect. As Ms. Marx and the Solicitor General have explained, the second sentence of § 1692k(a)(3) covers the field of awards to a defendant when the plaintiff does not

prevail. Section 1692k(a)(3) does not address costs awarded for other reasons, such as to sanction misconduct or under Rule 68.

Although GRC primarily argues that the second sentence of § 1692k(a)(3) reiterates Rule 54(d), it also floats (at 23) the idea that the sentence may broaden the courts' authority to award costs to *non-prevailing* defendants and, in this way, address a different subject altogether than does Rule 54(d). Section § 1692k(a) rebuts this theory, as it provides that a non-prevailing defendant "is liable" for the plaintiff's costs and reasonable attorney's fees. To read the provision as providing both for a non-discretionary cost award *against* a non-prevailing defendant and a discretionary cost award *for* a non-prevailing defendant would make no sense, as the latter would be meaningless in light of the former. The sole case that GRC cites (at 23) illustrates this point: In *Cohen v. American Credit Bureau, Inc.*, 2012 WL 847429 (D.N.J. 2012), the court awarded fees to the plaintiff, who had prevailed, not to the defendant.

Building on GRC's theory, amicus ACA International posits (at 6) that "and costs" in § 1692k(a)(3) may serve the independent function of providing authority for courts to award costs to a non-prevailing defendant when a plaintiff voluntarily dismisses her case. Citing cases that do not address the issue, ACA offers no reason to think that Congress had this category of cases in mind or believed costs to be unavailable under Rule 54(d) in such cases. In fact, courts have authority to award costs after voluntary dismissal. *See* 10 Charles Alan Wright, et al., *Federal Practice & Procedure* § 2667 & n.14 (3d ed. 2012); *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 458 (10th Cir. 1995) (en banc) (cost award under Rule 54(d) based on voluntary dismissal with or without prejudice); *see also* Fed. R. Civ. P. 41(a)(2) (2012) (court order may impose

terms on voluntary dismissal). And ACA says nothing about the state of the law when the FDCPA was enacted in 1977, which Congress would have understood to allow cost awards following voluntary dismissals. *See Mobile Power Enters., Inc. v. Power Vac, Inc.*, 496 F.2d 1311, 1312 (10th Cir. 1974) (stating that defendant is entitled to costs where plaintiff voluntarily dismisses action without prejudice), *overruled on other grounds by Cantrell*, 69 F.3d at 456; *Lawrence v. Fuld*, 32 F.R.D. 329, 331 (D. Md. 1963) ("Defendants have cited a wealth of authority showing that dismissals [without prejudice] have been conditioned upon payment of costs in varying amounts[.]"); *see also* Fed. R. Civ. P. 41(a)(2) (1976) (court may impose terms and conditions on dismissal by plaintiff). As with cases dismissed on the merits, § 1692k(a)(3) restricts cost awards in voluntarily dismissed cases to those in which the court finds bad faith and an intent to harass. ACA's notion thus does not provide an alternative purpose for "and costs."[2]

Finally, the words "and costs" cannot be explained away as indicating that awardable costs under the FDCPA are not confined to taxable costs specified in 28 U.S.C. § 1920. If statutes providing for costs authorized awards of items outside of § 1920's enumeration of awardable costs, § 1920 would not apply to awards under dozens of statutes. *See, e.g.*, Resp. Br. 21 nn. 2-4 & 24 (listing statutes that specify cost shifting). This Court has repeatedly rejected such suggestions. *See Arlington Cent. Sch. Dist. Bd. of*

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[2] ACA International also errs in contending (at 12) that Ms. Marx's reading would dramatically increase the number of statutes that trump Rule 54(d). A statute that addresses a different matter from Rule 54(d)—for instance, to take ACA's example, one that addresses an award of costs against an attorney, rather than a party, *see* 28 U.S.C. § 1927—does not displace the Rule 54(d) presumption.

Educ. v. Murphy, 548 U.S. 291, 297-98 (2006) (in Individuals with Disabilities Education Act, "recoverable costs is obviously the list set out in 28 U.S.C. § 1920"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991) (costs under 42 U.S.C. § 1988 limited to costs set out in 28 U.S.C. § 1821 and § 1920); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987) (rejecting argument that "costs" in Rule 54(d) are not limited to the list set out in § 1920). Accordingly, decisions in FDCPA cases awarding expenses that are not taxable costs make such awards as part of the attorney's fee, not as "costs." *See Giovannoni v. Bidna & Keys*, 255 F. App'x 124, 126 (9th Cir. 2007); *McNall v. Credit Bureau of Josephine County, Inc.*, 2011 WL 711095, at *6 (D. Or. 2011).

C. GRC seems to concede (at 22) that applying a clear statement rule to determine whether a statute provides otherwise than Rule 54(d) is unwarranted. At the same time, GRC would impose arbitrary restrictions on the way in which a statute can provide otherwise. Based on an inapposite string cite to statutes that bar an award of costs against plaintiffs or petitioners, GRC at first argues (at 19) that "Congress knows how to foreclose a court's discretion under Rule 54(d) when Congress so intends." Here, by contrast, Congress was not foreclosing the court's discretion; it was limiting it to cases that satisfy a stated condition.

GRC later agrees that Congress can limit discretion without foreclosing it, but seems to argue (at 19-20) that Congress must phrase the limitation in a particular way. Essentially, GRC argues that a statute can condition an award of costs by stating that costs will *not* be awarded "unless" a condition occurs, but a statute cannot condition an award of costs by stating, as does § 1692k(a)(3), that costs *may* be awarded *if* a condition occurs. GRC offers no

support for this proposition, and no rule of grammar or statutory construction justifies it. Indeed, the 1937 advisory committee's note cites a statute that follows the "may . . . if" format as an example of one that will be unaffected by Rule 54(d). *See* Fed. R. Civ. P. 54 advisory committee's note (1937) (citing 15 U.S.C. § 77k(e), which provides that "costs may be assessed" in favor of a prevailing party "if the court believes the suit or the defense to have been without merit").

D. GRC spends several pages discussing the legislative history of the FDCPA and citing statements of various senators during a markup session on a version of the bill that became the FDCPA. *See* Resp. Br. 30-32 (citing Markup Session, S. 1130—Debt Collection Legislation (July 26, 1977)). Read in context, the markup discussion reflects Congress's effort to draft a statute that balanced "the incentive on the part of the debt collector to abide by the law" and "the incentive for the consumer to file a suit if he's been subjected to an abuse." Markup Session at 17 (statement of Sen. Taffer). Most of the discussion (including most of the pages cited by GRC) centered on statutory damages caps, proof of harassment of consumers by debt collectors, and suits over technical violations. Neither the bona fide error defense nor the provision for awarding fees and costs to defendants was debated at the markup; the provisions were mentioned by senators explaining their view that concerns articulated about meritless litigation were already addressed in the bill.

To the extent that the markup discussion says anything about § 1692k(a)(3), it reflects the statement incorporated into the Senate Report on the final version of the bill that, under § 1692k(a)(3), "to protect debt collectors from nuisance suits," a court may award fees and costs to a debt collector if the court finds that a consumer brought a case

in bad faith and for the purpose of harassment. S. Rep. No. 95-382 at 5 (1977). The markup, like the Senate Report, does not shed light on the answer to the question here—whether § 1692k(a)(3) "provides otherwise" than Rule 54(d) by conditioning an award of costs to prevailing defendants on a finding of bad faith and intent to harass. And whereas "clear evidence of congressional intent may illuminate ambiguous text," this Court does "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011); *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n. 2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.").

As for statutory purpose, the legislative history is clear that Congress intended consumers subjected to collection abuses to be the primary enforcers of the FDCPA. *See* S. Rep. No. 95-382, at 5. Most of those consumers are people already in debt, and yet, in light of the bona fide error defense, they can lose in litigation even when they successfully prove a statutory violation. *See* 15 U.S.C. § 1692k(c). Thus, debt collectors who prevail in FDCPA cases are not necessarily "innocent," to use GRC's repeated characterization. If Rule 54(d) applied in all cases, even consumers who bring FDCPA cases based on genuine violations of the statute would risk falling deeper into debt.

Further, as the $4,543 award in this case shows, if cost awards to prevailing FDCPA defendants were presumptive, the risk to a plaintiff of bringing a case would often outweigh the potential gain, undermining enforcement of the statute. Congress provided for statutory damages to incentivize consumers to bring FDCPA suits, but capped those damages at $1,000. *See* 15 U.S.C. § 1692k(a)(2). High

cost awards would dramatically skew the incentives to bring the suits that the statutory damages awards are intended to incentivize.[3] In the context of this statute, Congress may reasonably have concluded that cost awards should, as the statutory language states, be conditioned on a finding of bad faith and intent to harass.

Citing the number of FDCPA cases filed, GRC suggests (at 40-42) that consumers are bringing the "nuisance" suits that Congress sought to deter. It is more likely, however, that the number of suits reflects the amount of debt-collection activity and the conduct of debt collectors. *See* CFPB, *Annual Report 2012: FDCPA* 4 (2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf ("The collection industry continues to be a top source of complaints to the FTC.").

More importantly, the cases about which *Congress* expressed concern are those brought "in bad faith and for the purpose of harassment." If GRC's complaint is that consumers are frequently bringing such suits, courts have the power under § 1692k(a)(3) to award fees and costs in those cases. If GRC's complaint is that the statutory standard does not capture GRC's view of what should be deemed "nuisance suits," GRC may ask Congress to legislate a stronger deterrent. *Cf. Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it

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[3] *See, e.g., Shepherd v. Liberty Acquisitions, LLC*, 2012 WL 2708518, at *8 (D. Colo. 2012) ($1,000 damages award); *Reed v. Budzik & Dynia, LLC*, 2012 WL 2568140, at *1 (E.D. Mo. 2012) ($1,000 damages award); *Woods v. Sieger, Ross & Aguire, LLC*, 2012 WL 1811628, at *10 (S.D.N.Y. 2012) ($2,000 award for statutory and actual damages).

should amend the statute to conform it to its intent." (internal quotation marks and alteration omitted)).

Because Congress expressly provided for lawsuits under the FDCPA, GRC's broadside attack on such suits is misplaced. In any event, GRC's concerns about what it supposes "would" happen if the Court reads § 1692k(a)(3) to provide otherwise than Rule 54(d) are unwarranted because that reading is the majority view and, until the decision below, the only view expressed by a federal court of appeals. *See* Pet. Br. 8 n.2 (citing cases). This Court would not increase nuisance litigation by confirming the status quo.

E. The FDCPA is one of eight statutes within the Consumer Credit Protection Act. As GRC observes (at 35), six of the eight do not address cost awards to prevailing defendants. GRC argues, essentially, that because the FDCPA contains a provision that these other statutes do not, the provision should not be given its plain meaning. Yet because § 1692k(a)(3) has no counterpart in those statutes, the FDCPA necessarily does something that the others do not. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation and internal quotation marks omitted)). That the eight statutes have differences is not surprising because they were enacted in eight different years, spread over a 28-year period from 1968 to 1996, to address different problems in the consumer credit industry, with a different mix of consumer and government enforcement in each statute.

Focusing on a provision of the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693m(f), GRC argues (at 36) that if "and costs" is given effect in § 1692k(a)(3), then not only the FDCPA but also the EFTA will provide otherwise than Rule 54(d). To begin with, GRC offers no support for its suggestion that statutory language should not be read according to its plain meaning if that language appears in two statutes. In any event, GRC's premise is incorrect: The EFTA provision is not "virtually identical" to the FDCPA provision. Section 1693m(f) provides that, on a finding that an action was brought in bad faith or for purposes of harassment, the court "shall" award to the defendant attorney's fees and costs. The EFTA states the condition under which a court is *required* to make an award, and if the condition is not met, the court is *not* required to do so—but also is not forbidden from doing so. In contrast, in the FDCPA, the condition does not address when the court is required to make an award, but when the court is *permitted* to ("may") make an award. When the condition is not met, the court is *not* so authorized. Thus, although GRC's argument would be no stronger if the EFTA and the FDCPA provisions were identical, they are not.

II. The Rule 68 Issue Briefed by GRC Does Not Present an Alternative Ground for Affirmance.

In the alternative, GRC argues that the Court should affirm the decision below by holding that the award of costs was proper under Federal Rule of Civil Procedure 68. This argument has been waived and is not fairly included in the question presented by Ms. Marx. In addition, the argument is foreclosed by this Court's decision in *Delta Air Lines v. August*, 450 U.S. 346 (1981), which squarely holds that Rule 68's cost-shifting provision does not apply where a plaintiff loses her case.

A. The Rule 68 Issue Is Not Before the Court.

1. Under this Court's Rule 15.2, non-jurisdictional arguments not called to the Court's attention in the opposition to the petition for writ of certiorari "are normally considered waived." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011). Here, the brief in opposition to the petition did not mention Rule 68 even once. And far from suggesting that *Delta Air Lines* might be overruled, the brief relied on that decision as support for its argument. *See* Resp. Br. in Opp. 11, 12. Not surprisingly given GRC's silence about Rule 68, neither Ms. Marx nor her *amici* discussed the issue in their briefs. *See also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999) (Rule 15.2 "assur[es] adequate preparation time for those likely affected and wishing to participate").

Moreover, although the parties argued below about whether GRC's offer was a proper offer of judgment, neither mentioned either *Delta Air Lines* or the question whether Rule 68 applies when the plaintiff loses the case. Not until the Tenth Circuit's opinion, which held "for reasons different than those argued" that costs could not be awarded to GRC under Rule 68, Pet. App. 15a, was *Delta Air Lines* mentioned, and then only to state the established law, overlooked by both parties, that "Rule 68 applies only where the district court enters judgment in favor of a plaintiff for an amount less than the defendant's settlement offer." *Id.* (citing *Delta Air Lines*, 450 U.S. at 352 (1981)).

GRC rightly does not suggest that this Court cannot decide the question before it—whether the FDCPA "provides otherwise" than Rule 54(d)—without reaching the Rule 68 issue. There is "no reason to sidestep" Rule 15.2 here. *Carrigan*, 131 S. Ct. at 2351.

2. This Court considers "[o]nly the questions set out in the petition, or fairly included therein." Sup. Ct. R. 14.1(a). The Rule 68 issue is not "fairly included" within the question presented here.

GRC crops the question (at i, 44 n.11) to cut its preamble, but read as a whole, the question on which the Court granted certiorari clearly asks whether the FDCPA "provides otherwise" than Rule 54(d). Indeed, even without the preamble, to answer the question presented by reference to Rule 68, one would have to add so many conditions not implied in the question that it would be apparent that the answer addressed an entirely different question, not an "included" question.

GRC's opposition to the petition again makes the point. That the opposition does not mention Rule 68 shows that the GRC itself understood exactly what this case is about: the relationship between § 1692k(a)(3) and Rule 54(d).

The Court disregards Rule 14.1(a) "only in the most exceptional cases." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (citation and internal quotation marks omitted). This case is not one of them.

B. This Court Resolved the Rule 68 Issue 31 Years Ago.

Delta Air Lines decided a straightforward question about the operation of Rule 68's cost-shifting provision. The decision—that the provision does not apply where the plaintiff declines a Rule 68 offer and then loses the case entirely—has been applied without difficulty or confusion for 31 years.

Considerations of "stability, predictability, and respect for judicial authority" require that a departure from precedent be supported by "some compelling justification."

Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991). Rehashing arguments made in 1980, GRC asks the Court to overturn its precedent because GRC disagrees with the decision, but offers no "compelling justification" for revisiting the issue. Indeed, GRC cites (at 47) *Pearson v. Callahan*, 555 U.S. 223, 233-34 (2009), but fails to explain how the circumstances here satisfy even one consideration identified in that case. For example, *Delta Air Lines* did not "establish a judge-made rule"; it construed a Federal Rule of Civil Procedure. The precedent is not "recently adopted"; it is more than 31 years old. And experience has not "pointed up the precedent's shortcomings"; the precedent operates as expected. While GRC cites a handful of opinions critical of *Delta Air Lines*, a large majority of lower court decisions have applied the decision without difficulty.[4] Similarly, GRC's claim (at 49) that "[c]ommentators" have questioned *Delta Air Lines* is overblown, supported only by citation to a student note published one year after the decision.

GRC also argues (at 48-49) that *Delta Air Lines* should be discarded because Rule 68 has been amended to eliminate the words that formed the "basis of the majority's conclusion." In fact, as the advisory committee explicitly stated, those amendments were "technical" or "stylistic only" and made no "substantive change." Fed. R. Civ. P. 68 advisory committee's note (1987 & 2007).

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[4] *See, e.g.*, *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1281 (10th Cir. 2011); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1050 (9th Cir. 2011); *Tidemann v. Nadler Golf Car Sales, Inc.*, 224 F.3d 719, 726 (7th Cir. 2000); *Gil de Rebollo v. Miami Heat Ass'ns, Inc.*, 137 F.3d 56, 67 (1st Cir. 1998); *In re Water Valley Finishing, Inc.*, 139 F.3d 326, 328 (2d Cir. 1998); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 334 (5th Cir. 1995); *Landon v. Hunt*, 938 F.2d 450, 451 n.1 (3d Cir. 1991).

Adherence to precedent is particularly appropriate where "Congress remains free to alter" the decision in question. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). In the 1980s, both Congress and the Judicial Conference of the United States considered and rejected proposals to overturn *Delta Air Lines*. *See* S. 2038, 99th Cong. § 4 (1986); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, reprinted in* 102 F.R.D. 407, 432-33, 436 (1984); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, reprinted in* 98 F.R.D. 337, 362-63, 367 (1983). In these circumstances, it would be inappropriate for the Court now to supersede those bodies and, effectively, amend the Rule.

CONCLUSION

The Tenth Circuit's affirmance of the cost award should be reversed.

Respectfully submitted,

DAVID M. LARSON
88 Inverness Circle East
Suite I-101
Englewood, CO 80112
(303) 799-6895

ALLISON M. ZIEVE
Counsel of Record
SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

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Counsel for Petitioner

AMICUS CURIAE BRIEF

No. 11-1175

In the Supreme Court of the United States

OLIVEA MARX, PETITIONER

v.

GENERAL REVENUE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

MEREDITH FUCHS
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
DAVID M. GOSSETT
Assistant General Counsel
KRISTIN BATEMAN
Attorney
Consumer Financial Protection Bureau
Washington, D.C. 20552

WILLARD K. TOM
General Counsel
JOHN F. DALY
Deputy General Counsel
DAVID L. SIERADZKI
Attorney
Federal Trade Commission
Washington, D.C. 20580

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 54(d)(1), which permits cost-shifting "[u]nless a federal statute" or another rule "provides otherwise," allows taxation of costs against a plaintiff who filed suit in good faith under the Fair Debt Collection Practices Act, 15 U.S.C. 1692k, which authorizes taxation of costs against plaintiffs only when they file actions "in bad faith and for the purpose of harassment."

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case concerns the taxation of litigation costs in private enforcement actions under the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.* The Federal Trade Commission (FTC), Consumer Financial Protection Bureau (CFPB), and other agencies share responsibility for government enforcement of the Act. 15 U.S.C. 1692*l*(a)-(b);[1] see 15 U.S.C. 1692*l*(d) (CFPB authority to prescribe rules for debt collection). Private enforcement actions under Section 813 of the FDCPA, 15 U.S.C. 1692k, supplement those governmental efforts. The United States therefore has a substan-

[1] All references to 15 U.S.C. 1692k and 1692*l* are to the 2006 edition and Supplement IV to the United States Code.

tial interest in the procedural rules governing such enforcement actions.

STATEMENT

1. The FDCPA is one of a series of consumer-protection statutes, collectively entitled the Consumer Credit Protection Act, 15 U.S.C. 1601 *et seq.*, that Congress enacted beginning in 1968. The FDCPA became law in 1977 and is Title VIII of the larger statute. Pub. L. No. 95-109, 91 Stat. 874.

Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a). Congress found that those practices "contribute[d] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Ibid.* The purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e).

Inter alia, the Act forbids debt collectors from employing harassing, oppressive, or abusive practices, 15 U.S.C. 1692d; from making misleading or deceptive representations, 15 U.S.C. 1692e; and from using unfair or unconscionable means to collect debts, 15 U.S.C. 1692f. The Act also limits debt collectors' ability to contact consumers' employers, neighbors, and other third parties in connection with collecting a debt, 15 U.S.C. 1692c(b); guarantees consumers an opportunity to dispute debts, 15 U.S.C. 1692g(a)-(b); and generally bars attempts to collect a disputed debt until the debt is verified, *ibid.*

The Act applies primarily to consumer debt collection by third-party debt collectors; it does not apply to commercial debts or to creditors who collect their own debts in their own names. See 15 U.S.C. 1692a(3), (5) and (6)(A).

In addition to authorizing enforcement by certain federal agencies (chiefly the FTC and CFPB), 15 U.S.C. 1692*l*, the FDCPA creates a "calibrated scheme of statutory incentives to encourage self-enforcement" by affected consumers. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010). The FDCPA's private-enforcement provision, 15 U.S.C. 1692k, generally authorizes any aggrieved person to pursue remedies against "any debt collector who fails to comply with any provision" of the Act. 15 U.S.C. 1692k(a). Any such action must be filed "within one year from the date on which the violation occurs." 15 U.S.C. 1692k(d). The Act establishes affirmative defenses for debt collectors, which preclude liability in cases where the debt collector has relied in good faith on a federal-agency advisory opinion, or in cases of "bona fide error" where the debt collector has reasonable procedures in place and the violation was unintentional. 15 U.S.C. 1692k(c) and (e).

A prevailing plaintiff in an FDCPA enforcement action is entitled to recover for "any actual damage" she suffered from the violation. 15 U.S.C. 1692k(a)(1). The court may also award statutory damages, subject to certain caps. In an individual suit, the plaintiff may recover "such additional damages as the court may allow, but not exceeding $1000." 15 U.S.C. 1692k(a)(2)(A). In determining the appropriateness or size of a statutory-damages award, the court considers, *inter alia*, the "frequency and persistence of noncompliance by the debt collector," the "nature of such noncompliance," and the

"extent to which such noncompliance was intentional." 15 U.S.C. 1692k(b).

The FDCPA's private-enforcement provision also authorizes the court to award attorney's fees and costs in specified circumstances. First, "in the case of any successful [enforcement] action," the defendant is liable for "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. 1692k(a)(3). Second, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Ibid.*

2. Petitioner is a former student who sought training as a medical assistant in the belief that her educational expenses were covered by a grant. J.A. 27-28. What she thought was a grant was in fact a relatively large student loan. *Ibid.* Respondent, a commercial debt collector, was hired to collect on that loan. Pet. App. 2a.

Petitioner subsequently filed an FDCPA enforcement action against respondent. Pet. App. 2a. Her complaint, as amended, alleged that respondent had harassed her with phone calls several times a day; had impermissibly threatened to garnish 50% of her wages and take money directly from her bank account; and had unlawfully sent a debt-collection-related fax to her employer. J.A. 16-21.

After a one-day bench trial, the district court ruled in favor of respondent. Pet. App. 2a-3a; see J.A. 26-33. Although the court did not find petitioner "untruthful," and was "sure she remember[ed]" relevant events in the way she claimed, it nevertheless declined to credit certain portions of her testimony. J.A. 29-30.

The district court concluded that petitioner had been "in a very vulnerable position" when she interacted with respondent, and that her emotional state had "affected her ability to understand and to recall the details" of those interactions. J.A. 27, 32. The court emphasized that the "stresses on [petitioner] at that time were enormous": petitioner was a single mother living with two "very young" children, was in a child-support dispute with the children's father, was working a job that "at best * * * cover[ed] her expenses," and was "behind in her rent" and therefore "subject to possible eviction." J.A. 27. The court believed that in her "panic" at discovering that she owed on a student loan, petitioner had "misinterpreted" certain communications with respondent. J.A. 28-30; see J.A. 32. The court also concluded—although it found the issue "close"—that respondent's fax to petitioner's employer had not violated the FDCPA because the employer would not have understood the fax to relate to debt collection. J.A. 30-31.

3. In addition to dismissing petitioner's suit, the district court's judgment ordered petitioner to pay respondent's costs. Pet. App. 30a-31a. Those costs totaled $4543.03, of which $2183.40 was to compensate the court reporter and $2359.63 was to compensate respondent's witnesses. J.A. 37-40.

Petitioner filed a post-judgment motion objecting to the taxation of costs against her. 1:08-cv-02243 Docket entry No. 77 (June 8, 2010) (Post-Judgment Motion). She contended that the FDCPA did not authorize such an award because the court had made no finding that she filed suit "in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3); see Post-Judgment Motion 1-5.

The district court rejected petitioner's argument. Pet. App. 28a-29a. It concluded that an award of costs was warranted under Federal Rule of Civil Procedure 54(d)(1), which states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1); see Pet. App. 28a-29a. The court found that "the statutory language requiring a finding of bad faith and harassment is applicable only for an award of attorney fees and does not displace Rule 54(d)." Pet. App. 29a. The district court also concluded, in the alternative, that costs were taxable under Federal Rule of Civil Procedure 68, which requires a party to pay costs in certain circumstances when it has declined a pre-trial offer of judgment from the opposing party. *Ibid.*

4. Petitioner appealed the district court's award of costs, as well as its determination that respondent's fax to her employer had not violated the FDCPA. Pet. App. 3a. The court of appeals affirmed. *Id.* at 2a.

As relevant here, the court of appeals upheld the award of costs under Rule 54(d)(1). Pet. App. 6a-14a.[2] The court viewed Rule 54(d)(1) as reflecting a "venerable" presumption that a prevailing party may recover costs from the losing party. *Id.* at 8a. It stated that a "clear showing of legislative intent is needed" in order to "find that Rule 54(d) is displaced by a statute." *Ibid.* The court concluded that neither the text nor the history of the FDCPA's private-enforcement provision reflects a clear congressional intent to displace Rule 54(d) in prevailing-defendant suits. See *id.* at 6a-14a.

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[2] The court of appeals concluded that Rule 68 did not authorize the district court's award of costs in this case. See Pet. App. 14a-15a.

Judge Lucero dissented. Pet. App. 19a-25a. He would have read Section 1692k(a)(3) to establish the exclusive conditions under which costs may be awarded to a prevailing defendant in an FDCPA suit. See *id.* at 24a. Because the district court had not found that petitioner brought suit "in bad faith and for the purpose of harassment," Judge Lucero would have reversed the award of costs. *Id.* at 25a. He pointed out that, under the majority's view, "Congress passed a statute permitting a cost award conditioned upon a finding of bad faith, but intended to permit cost awards without a finding of bad faith." *Ibid.* "In other words," he continued, "the majority concludes * * * that a portion of the FDCPA is mere surplusage." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that Federal Rule of Civil Procedure 54(d)(1) authorizes a court to tax costs against a consumer who files a good-faith FDCPA enforcement action. The text of Rule 54(d)(1) makes clear that, if the federal statute under which suit is brought establishes a cost-shifting standard different from the one contained in the Rule, the statutory standard will control. The specific cost-shifting provision applicable to FDCPA enforcement actions, 15 U.S.C. 1692k(a)(3), allows taxation of costs against a plaintiff only when the action was filed in bad faith. By protecting good-faith plaintiffs from cost awards, the Act preserves its carefully calibrated incentives for consumers to bring the private enforcement actions that are critical to carrying out the FDCPA's deterrent and remedial purposes.

A. Rule 54(d)(1) establishes a default standard under which a district court, in its discretion, may award costs

to a prevailing party in a federal civil case. That default standard only applies, however, "[u]nless a federal statute" or another federal rule "provides otherwise." Fed. R. Civ. P. 54(d)(1). Rule 54(d)(1) thus expressly incorporates the established canon of statutory construction that "a precisely drawn, detailed statute pre-empts more general remedies." *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 434 (2007).

Congress frequently displaces Rule 54(d)(1)'s general default standard by crafting different cost-shifting rules that are tailored to particular causes of action. The drafters of Rule 54(d) did not purport to require, and could not appropriately have required, that Congress employ any particular form of words in order to supersede the Rule's default standard. Instead, Rule 54(d)(1)'s default standard necessarily gives way when the circumstances of a particular case are addressed (explicitly or implicitly) by another statute or rule—as, for example, when the Rule would permit recovery of costs in circumstances where a more specific cost-shifting provision would not.

B. The FDCPA's cost-shifting provision for private enforcement actions, 15 U.S.C. 1692k(a)(3), displaces Rule 54(d)(1)'s default standard. With respect to private suits in which the defendant ultimately prevails, the Act states that "the court may award" reasonable attorney's fees "and costs" upon "a finding by the court that [the] action * * * was brought in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3). Nothing in the Act authorizes the taxation of costs against a consumer who brings an FDCPA enforcement action in good faith. If Congress had intended to permit that result, it could either have said nothing at all on the topic of costs—thereby inviting application of Rule 54(d)(1)'s

default standard—or else expressly provided for cost awards to prevailing defendants without requiring a showing of bad faith. The court of appeals' approach renders superfluous Congress's express designation of a particular category of unsuccessful FDCPA suits as to which cost-shifting is appropriate.

C. Congress had good reason not to allow district courts to tax costs against good-faith FDCPA plaintiffs. The Act's goal of deterring and remedying abusive debt-collection practices depends upon the willingness and ability of consumers affected by those practices to bring private enforcement actions. See S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977); *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010). The expected potential recovery in such enforcement actions is often modest; potential FDCPA plaintiffs are often already in debt; and even a consumer who believes in good faith that her rights under the Act have been violated cannot be fully confident that she will ultimately prevail. A rule that authorized prevailing defendants to recover their costs as a matter of course would therefore create a significant disincentive to the prosecution of private enforcement actions.

Respondent suggests that it would be unfair to deny it a cost award that Rule 54(d)(1) would allow. In crafting standards for fee- and cost-shifting under the FDCPA, however, Congress departed significantly from the background rules that generally govern awards of fees and costs. The cost-shifting rules set forth in Section 1692k(a)(3), rather than the default standard that applies in the absence of a more specific congressional judgment, are controlling here.

ARGUMENT

RULE 54(D)(1) DOES NOT AUTHORIZE COURTS TO TAX COSTS AGAINST GOOD-FAITH FDCPA PLAINTIFFS

Congress enacted the FDCPA to curtail abusive debt-collection practices. See 15 U.S.C. 1692(a) and (e); *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1608 (2010). The primary way in which the Act deters and remedies such practices is by authorizing affected consumers to bring private enforcement actions against debt collectors who violate the Act's substantive requirements. See S. Rep. No. 382, 95th Cong., 1st Sess. 5 (1977) (Senate Report); *Jerman*, 130 S. Ct. at 1624. The Act's private-enforcement provision, 15 U.S.C. 1692k, accordingly creates "statutory incentives to encourage self-enforcement," while "expressly guard[ing] against abusive lawsuits." *Jerman*, 130 S. Ct. at 1620, 1624. As particularly relevant here, the provision encourages self-enforcement by awarding both attorney's fees and costs to a prevailing consumer, while discouraging unjustified litigation by permitting district courts to tax costs and attorney's fees against plaintiffs who sue "in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3).

The court of appeals' decision, which permits the taxation of costs even against good-faith FDPCA plaintiffs, inappropriately "chill[s] private suits under the statutory right of action, undermining the FDCPA's calibrated scheme." *Jerman*, 130 S. Ct. at 1624. If potential good-faith FDCPA plaintiffs, many of whom are already in considerable debt, must face the prospect of paying thousands of dollars in costs if they do not ultimately prevail, they will be discouraged from filing potentially meritorious enforcement actions. The court of

appeals erred in believing that Federal Rule of Civil Procedure 54(d)(1) authorizes that result. Rule 54(d)(1) provides only a general default standard for awarding costs to prevailing parties. By the Rule's express terms, that standard gives way when Congress has tailored a competing cost-shifting rule to meet the needs of a specific statutory scheme, as it has in the FDCPA.

A. Under Rule 54(d)(1)'s Express Terms, The Rule's Default Cost-Shifting Standard Yields To Contrary Provisions

1. Rule 54(d)(1) provides in relevant part that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed R. Civ. P. 54(d)(1). The costs awardable under the rule are enumerated in 28 U.S.C. 1920 and include certain court and witness fees. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2001 (2012). Rule 54(d)(1) authorizes district courts to require a losing party to pay any such costs incurred by the prevailing party, and creates a presumption favoring such cost-shifting, "unless * * * some other provision for costs is made by a federal statute or the civil rules." 10 Charles Alan Wright et. al. *Federal Practice & Procedure* § 2665, at 200 (3d ed. 1998 & Supp. 2012) (Wright & Miller).

Pursuant to Rule 54(d)(1)'s subordination clause, many federal statutes displace its default cost-shifting standard. See 10 Wright & Miller § 2670, at 257-261; 10 James Wm. Moore, *Moore's Federal Practice* § 54.101[1][c], at 54-160 (3d ed. 2012) (Moore). "Congress frequently provides for the award of costs when it creates specific statutory rights," resulting in "numerous" specific provisions with "variant" treatment of costs

depending upon the particular federal statute under which a given claim arises. 10 Wright & Miller § 2670, at 259; see 10 Moore § 54.101[1][c], at 54-160 ("The statutes preempting the court's discretion under Rule 54(d)(1) are far too numerous to list comprehensively.").

The drafters of Rule 54(d) made clear that they intended that result. The original 1937 version of Rule 54(d) provided, in pertinent part, that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Rule 54(d) in its original form thus contemplated that an "express provision" for "costs" in the U.S. Code or the civil rules would supersede the Rule's default cost-shifting standard in the event of any inconsistency. The original advisory committee notes contained a non-exhaustive list of 25 "statutes as to costs" that would be "unaffected" by the new rule. Fed. R. Civ. P. 54 advisory committee's note (1937). That list included statutes mandating cost awards in certain circumstances, see 15 U.S.C. 15 (1934); forbidding cost awards in certain circumstances, see 35 U.S.C. 71 (1934); giving district courts full discretion to award costs to either party, see 15 U.S.C. 78i(e) (1934); and giving district courts only the limited discretion to award costs to a prevailing party when certain preconditions were satisfied, 15 U.S.C. 77k(e) (1934). Fed. R. Civ. P. 54 advisory committee's note (1937). Although the Rules Committee updated the language of the subordination clause in 2007 "as part of the general restyling of the Civil Rules," that change was "stylistic only" and thus did not substantively alter the clause's scope. Fed. R. Civ. P. 54 advisory committee's note (2007).

2. Rule 54(d)(1)'s subordination clause thus codifies, in the context of cost-shifting, "the well-established principle" that "'a precisely drawn, detailed statute preempts more general remedies.'" *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007)). The first edition of *Moore's Federal Practice*, published shortly after Rule 54(d)'s adoption, explained that while "the prevailing party is normally entitled to costs as of course" under the Rule, "an express provision in a federal statute * * * prevails over the generality of the normal rule." 3 James Wm. Moore et al., *Moore's Federal Practice* § 54.04, at 3159-3160 (1938). And this Court has itself relied on a version of the specific-governs-the-general canon to reject an interpretation of the term "costs" that would have allowed parties to recover under Rule 54(d) certain types of expenses (*e.g.*, expert witness fees) beyond those specifically permitted by statute. *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one.") (citation, brackets and quotation marks omitted).

In applying the specific-governs-the-general canon, this Court has not required any express textual conflict as a prerequisite to displacement. See *e.g.*, *Hinck*, 550 U.S. at 506 (finding Tax Court jurisdiction to be exclusive notwithstanding "Congress's failure explicitly to define the Tax Court's jurisdiction as exclusive"); see also *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976) (surveying previous cases). The question instead is whether the matter at hand, either expressly or by implication, falls within the ambit of the more specific provision. The Court will find that the specific provision

displaces the more general one if, for example, the specific provision reflects a "strong policy" that application of the more general provision would "undermine," *ibid.* (internal quotation marks omitted), or if the specific provision reflects a limitation that application of the more general provision would "effortlessly evade," *EC Term of Years Trust*, 550 U.S. at 434. Such a limitation may include the specific provision's omission of a particular remedy that the more general provision would allow. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 454 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

3. In contrast to this Court's usual approach in specific-governs-the-general cases, the court below required a "clear showing of legislative intent" as a precondition to "find[ing] that Rule 54(d) is displaced by a statute." Pet. App. 8a. The court concluded that, because "[n]othing in the language of the [FDCPA] purports to exclude Rule 54(d) costs from being taxed and awarded in FDCPA suits," the Rule continues to govern awards of costs to prevailing FDCPA defendants. *Ibid.* The court further suggested that, in order "[t]o 'provide otherwise' than Rule 54(d)(1), [a] statute or rule would have to bar an award of costs to a prevailing party." *Id.* at 13a (quoting *Quan* v. *Computer Sciences Corp.*, 623 F.3d 870, 888 (9th Cir. 2010)). Respondent has similarly suggested that "express intent to negate Rule 54(d)" is required for displacement. Br. in Opp. 16. That approach is misguided for several reasons.

First, while Rule 54(d)(1) establishes a default rule that costs should presumptively be awarded to prevailing parties, the Rule specifically contemplates the prospect that other laws may "provide[] otherwise." A statute such as the FDCPA "provides otherwise" if it estab-

lishes a more demanding standard for awards of costs against unsuccessful plaintiffs. See 15 U.S.C. 1692k(a)(3). It would be anomalous to interpret Rule 54(d)'s explicit subordination clause to impose a *more* exacting specific-governs-the-general test than would normally apply even without such a clause.[3]

Second, as explained above, the drafters of the original Rule 54(d) identified 25 "statutes as to costs" that would be "unaffected" by the new rule. See p. 12, *supra*. The pre-existing laws to which the 1937 advisory committee's note referred took a number of different forms—including, like current Section 1692k(a)(3), the imposition of preconditions on awards of costs to prevailing parties—and obviously did not contain express references to Rule 54(d). See *ibid.* The Rule's drafters thus clearly contemplated that the new rule's broad authorization to award costs could be limited or superseded in a variety of ways, including by statutes that did not refer to the Rule itself.

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[3] Notwithstanding Rule 54(d)(1)'s express subordination clause, the court of appeals considered the "presumption that a prevailing party is entitled to costs" to be "a venerable one" that would warrant a clear-statement requirement. Pet. App. 8a. A court, however, lacks authority to substitute its own value judgment in place of the text of a federal rule. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) (observing that a federal criminal rule was, "in every pertinent respect, as binding as any statute duly enacted by Congress"). Federal cost-shifting has long been the province of statutes and rules, rather than judge-made law. See *Taniguchi*, 132 S. Ct. at 2001 ("[T]he taxation of costs was not allowed at common law."); see generally *ibid.* (summarizing history of cost-shifting); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247-257 (1975) (same). Whatever the historical practice might have been under previous statutes and rules, Rule 54(d) has provided the controlling law for the past 75 years and remains controlling now.

Third, even if Rule 54(d)(1) did not expressly contemplate the prospect of superseding cost-shifting provisions, the court of appeals' approach would be contrary to the background principles that govern the harmonization of general and specific legal directives. The specific-governs-the-general canon has never depended on the use of express language in the specific statute declaring the general rule to be inapplicable. Indeed, the canon would do no work if it were limited in that manner, since express language explaining how two existing statutes are to be harmonized always controls, regardless of the relative specificity of the two laws. The point of the specific-controls-the-general canon is that the specificity of a particular statute may *by itself* imply exclusivity, thus displacing the general rule.

Fourth, even if the drafters of the Federal Rules had purported to require Congress to use a particular form of words in order to supersede Rule 54(d)(1)'s default standard, such a requirement would be ineffective. "[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly or by implication as it chooses." *Dorsey* v. *United States*, 132 S. Ct. 2321, 2331 (2012) (citation omitted); see *id.* at 2331-2332 (explaining that the "necessary implication," "clear implication," or "fair implication" of a later-enacted law will control, even when an earlier statute on its face establishes a more demanding standard for amendment). That principle applies *a fortiori* when the earlier-adopted law is a federal rule rather than an Act of Congress.

B. The FDCPA Does Not Permit Taxation Of Costs Against Plaintiffs Who File Suit In Good Faith, Even If The Defendant Ultimately Prevails

1. The private-enforcement provision of the FDCPA, 15 U.S.C. 1692k, establishes explicit cost-shifting standards that displace Rule 54(d)(1)'s more general default standard. The first sentence of Section 1692k(a)(3) states that, "in the case of any successful action," the consumer's recovery will include "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. 1692k(a)(3). That sentence supersedes Rule 54(d)(1) by making an award of costs to a prevailing FDCPA plaintiff mandatory rather than discretionary. See 10 Moore § 54.101[1][c], at 54-160 (observing that some federal statutes "mandate * * * an award of costs in particular circumstances, removing the court's discretion under Rule 54(d)(1)").

The second sentence of Section 1692k(a)(3) states that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." That sentence supersedes Rule 54(d)(1) by narrowing the set of circumstances in which a prevailing defendant may receive a discretionary cost award. See 10 Moore § 54.101[1][c], at 54-160 (observing that some federal statutes "prohibit * * * an award of costs in particular circumstances, removing the court's discretion under Rule 54(d)(1)"). The district court in this case exceeded that narrowed authority by taxing costs against petitioner without finding that she had brought her suit in bad faith.

2. The court of appeals correctly recognized that the second sentence of Section 1692k(a)(3) contains both a fee-shifting and a cost-shifting rule. That sentence, the court explained, specifies "two separate pecuniary awards for a defendant who prevails against a suit brought in bad faith and for the purposes of harassment: (1) 'attorney's fees reasonable in relation to the work expended' and (2) 'costs.'" Pet. App. 7a; see *id.* at 7a-8a (rejecting respondent's argument that "costs" should be treated simply as a factor in determining "reasonable attorney's fees"); *Rouse* v. *Law Offices of Rory Clark*, 603 F.3d 699, 703-705 (9th Cir. 2010) (rejecting similar argument); see also Senate Report 5 (stating that in bad-faith cases, "the court may award the debt collector reasonable attorney's fees and costs").

Section 1692k(a)(3) thus does not authorize cost awards in all cases where the defendant prevails. Instead, it provides that "the court may award * * * costs" on "a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." That narrow authorization, contingent on satisfaction of a specified condition, is properly understood to state the exclusive ground on which costs may be awarded to prevailing FDCPA defendants.

3. In *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), the Court considered a statute providing that "[a]ny person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title." *Id.* at 166 (quoting 42 U.S.C. 9613(f)(1)) (emphasis added by Court). The Court determined that the "natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." *Ibid.*; see, *e.g.*,

Bruesewitz v. *Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) ("*Expressio unius, exclusio alterius.*"). The Court explained that "the natural meaning of 'may' in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others." *Cooper Industries*, 543 U.S. at 166. The Court additionally reasoned that interpreting the provision in a nonexclusive fashion would render the provision's conditional language "entirely superfluous," *ibid.*, thereby "violat[ing] the settled rule that we must, if possible, construe a statute to give every word some operative effect," *id.* at 167 (citing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 35-36 (1992)). The Court saw "no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." *Id.* at 166.

The same reasoning applies with full force to Section 1692k(a)(3). The court of appeals suggested that, in order to supersede Rule 54(d)(1)'s default standard, Congress was required to state expressly that costs may *not* be awarded against FDCPA plaintiffs who brought suit in good faith. See Pet. App. 13a ("To 'provide otherwise' than Rule 54(d)(1), [a] statute or rule would have to bar an award of costs to a prevailing party.") (quoting *Quan*, 623 F.3d at 888). But given the specificity with which Congress addressed cost awards to prevailing FDCPA defendants, that prohibition is clearly implicit in the language Congress enacted.

4. If Congress had wanted all prevailing FDCPA defendants to be eligible for cost awards, it could have achieved that objective in either of two ways. First, Congress could have stayed silent on the issue of prevailing-defendant cost awards in FDCPA cases and

specified only the circumstances in which courts in such cases could award prevailing defendants attorney's fees. That approach would have left intact Rule 54(d)(1)'s default cost-shifting standard. Alternatively, Congress could have drafted Section 1692k(a)(3) in such a way that the authorization to award costs to prevailing defendants was not contingent on a finding of bad faith. That approach would have ensured that cost awards to prevailing FDCPA defendants remained available, regardless of any amendments to the Federal Rules. Congress has taken both of those approaches in other statutes.[4] See, *e.g.*, 15 U.S.C. 15c(d)(2) (allowing discretionary bad-faith attorney-fee awards without mentioning costs); 15 U.S.C. 3608(d) (same); 42 U.S.C. 11046(f) (allowing discretionary awards of both costs and fees to a prevailing party); 42 U.S.C. 12205 (same).

Congress took neither approach in Section 1692k(a)(3). Rather, it mandated cost awards in all FDCPA cases where the plaintiff prevails, while making awards of costs to prevailing defendants available only

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[4] Indeed, other provisions of the Consumer Credit Protection Act itself authorize attorney's-fee awards against bad-faith litigants without mentioning costs. The Fair Credit Reporting Act, which is Title VI of the Consumer Credit Protection Act (see Pub. L. No. 91-508, § 601, 84 Stat. 1127-1128 (1970)), includes two provisions requiring an award of reasonable attorney's fees "to the prevailing party" when a court finds "that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment." 15 U.S.C. 1681n(c); 15 U.S.C. 1681*o*(b); see Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2412, 110 Stat. 3009-446 to 3009-447. The contrast between the omission of "costs" in those provisions, and the inclusion of "costs" in Section 1692k(a)(3), "supports that Congress intended" the FDCPA "to condition an award of costs to a prevailing defendant upon a finding of bad faith and harassment on plaintiff's part." *Rouse*, 603 F.3d at 706.

in narrow circumstances. The natural inference is that Congress intended Section 1692k(a)(3) to provide the exclusive standard for cost awards in FDCPA cases. See, *e.g.*, *Erika, Inc.*, 456 U.S. at 208 (concluding that Congress's "omission" of a particular remedy from a statute's "precisely drawn provisions" was "persuasive evidence that "Congress deliberately intended to foreclose" seeking that remedy through a more general statute).

The court of appeals, by contrast, imputed to Congress an intent specifically to authorize awards of costs to prevailing defendants in suits brought in bad faith, while leaving intact Rule 54(d)(1)'s pre-existing authorization to award costs to *all* prevailing FDCPA defendants. Congress had "no reason," however, to "bother" enacting selectively redundant provisions that merely confer upon district courts a subset of the authority they already possess. *Cooper Industries*, 542 U.S. at 166. The court of appeals' analysis is thus inconsistent with "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys* v. *United States*, 485 U.S. 759, 778 (1988).

C. Allowing Courts To Tax Costs Against Good-Faith FDCPA Plaintiffs Would Subvert The Balance Struck By Congress Between Encouraging Private Enforcement And Deterring Abusive Suits

Although the FDCPA provides for federal-agency enforcement, 15 U.S.C. 1692*l*, Congress understood and intended that the law would be "primarily self-enforcing" through suits by "consumers who have been subjected to collection abuses." Senate Report 5; see *Jerman*, 130 S. Ct. at 1624. Section 1692k(a)(3) reflects Congress's FDCPA-specific effort to strike an appropriate balance between encouraging private enforcement

and deterring abusive suits. Applying Rule 54(d)(1)'s default standard would upset that balance, inhibit private enforcement, and frustrate the Act's goal of discouraging and remedying abusive debt-collection practices.

1. Federal agencies cannot, as a practical matter, police the debt-collection industry by themselves. Debt collectors contact millions of consumers each year. CFPB, *Annual Report 2012: Fair Debt Collection Practices Act* 7 (2012), http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf (*2012 Report*); see *id.* at 4 ("In 2011, approximately 30 million individuals, or 14 percent of American adults, had debt that was subject to the collections process (averaging approximately $1,400)."). In recent years, consumers have lodged more complaints with the FTC about debt collectors than about any other industry. *Id.* at 6. In 2011 alone, the FTC received a total of 117,374 complaints about third-party debt collectors (who are subject to the FDCPA), representing 22.3% of the total complaints the FTC received about all industries combined. *Ibid.*; see *id.* at 7 and App. C (breaking down complaints by type of misconduct alleged).

Although that figure is only a rough proxy for FDCPA violations (since not all complaints reflect actual violations and not all violations generate complaints), *2012 Report* 5-6, it demonstrates that the potential need for enforcement exceeds federal-agency capacity by several orders of magnitude. Most agencies have authority to enforce the FDCPA only in very limited circumstances. 15 U.S.C. 1692*l*(b)(1)-(5). The FTC and CFPB have broader authority, 15 U.S.C. 1692*l*(a) and (b)(6), but they lack the resources to investigate any substantial percentage of the complaints they receive, let alone

to pursue litigation to remedy all of the FDCPA violations such investigations might uncover. See *Jerman*, 130 S. Ct. at 1624 (citing FTC study concluding that, "[b]ecause the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations"). The agencies therefore typically focus on "egregious" cases, or those in which consumer enforcement actions will be inadequate. *2012 Report* App. A at 2.

The FTC has been increasing its enforcement efforts in recent years, bringing more cases and obtaining stronger monetary and injunctive remedies against debt collectors who violate the Act. *2012 Report* 14. Nevertheless, the number of FDCPA cases it can pursue —seven were brought or resolved in 2011, *ibid.*—is not enough by itself to protect consumers adequately. The CFPB received authority to enforce the Act in July 2011, and its enforcement program therefore is still in its nascent stage. *Id.* at 3, 17. And many debt collectors have attempted to hamper federal investigations by conditioning private settlement agreements on the inclusion of "gag clauses," which purport to bar the settling consumers from cooperating with federal authorities. *Id.* at App. A at 10.

2. Because federal-agency enforcement efforts cannot realistically address the full scope of the problem, the FDCPA provides "statutory incentives to encourage self-enforcement" through private enforcement actions that do not require government intervention. *Jerman*, 130 S. Ct. at 1624. The Act's private-enforcement provision, 15 U.S.C. 1692k, reflects Congress's effort to make consumer enforcement economically feasible by autho-

rizing statutory damages as well as actual damages, and by compensating prevailing consumers for their attorney's fees and costs. See 15 U.S.C. 1692k(a); see also *Jerman*, 130 S. Ct. at 1620 n.15. At the same time, Congress recognized that some FDCPA plaintiffs might be motivated by an improper purpose, and it sought to deter abusive lawsuits as well as to facilitate well-founded ones. Congress struck what it viewed as the appropriate balance between those objectives, however, not by authorizing awards of fees and costs in all cases where an FDCPA plaintiff is unsuccessful, but by conditioning awards against plaintiffs on a judicial finding that the suit "was brought in bad faith and for the purpose of harassment." 15 U.S.C. 1692k(a)(3).

Application of Rule 54(d)(1)'s default cost-shifting standard, rather than Section 1692k(a)(3)'s FDCPA-specific one, would significantly alter the mix of incentives fashioned by Congress and could deter many meritorious private suits. Cf. Wright & Miller § 2665, at 202 (noting the "significant effect that a revision of the cost structure could have on the patterns of litigation and the willingness of individuals and organizations to institute and defend legal proceedings"). Consider, for example, a consumer who has been harassed by repeated telephone calls from a debt collector, see 15 U.S.C. 1692d(5), but whose provable "actual damage," 15 U.S.C. 1692k(a), is relatively slight. The FDCPA's authorization for statutory damages, 15 U.S.C. 1692k(a), would provide an additional incentive to bring an enforcement action. But those statutory damages are capped at $1000, *ibid.*, while a defendant's costs for a one-day trial can be greater than $4500, see Pet. App. 2a; see also, *e.g.*, *Rouse*, 603 F.3d at 702 (costs of more than $6500 following longer FDCPA trial). Under Rule 54(d)(1)'s default

standard, those costs could be assessed personally against the consumer (not against her attorney) if the defendant prevailed, whether or not the district court found that the suit had been brought in bad faith. See Wright & Miller § 2670, at 263.

If losing FDCPA plaintiffs were regularly held liable for costs much greater than the recoveries they could reasonably expect if their suits had been successful,[5] the filing of private FDCPA enforcement actions would be economically rational only if the perceived likelihood of success was very high. Many consumers who believed in good faith that their FDCPA rights had been violated would reasonably conclude, after performing that cost-benefit analysis, that the uncertainties associated with litigation rendered the pursuit of legal remedies unwise. Cf. *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978) ("No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable."). Thus, if Rule 54(d)(1)'s default cost-shifting standard applied to FDCPA enforcement actions, many consumers would likely be deterred from filing actions that they otherwise would have brought and won.

The risk-reward analysis would be particularly daunting for the consumers who are most frequently in a position to enforce the FDCPA. Persons who have been pursued by debt collectors are often in precarious

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[5] Some FDCPA plaintiffs allege fairly large actual damages. But even those plaintiffs will likely recognize that any ultimate damages award could well be smaller than the amount sought. And in any event, Congress's provision for modest statutory damages (capped at $1000) demonstrates its intent to create adequate incentives for private enforcement actions, even in the absence of sizable actual damages.

financial circumstances. Petitioner, for example, was at the time of trial a single mother, with a job that barely covered her expenses, at risk of eviction for falling behind on her rent. J.A. 27. For individuals in that situation, the prospect of owing thousands of dollars of costs if the suit is unsuccessful will likely operate as a particularly strong deterrent. And while several circuits permit at least some consideration of a party's indigence in considering whether to tax costs under Rule 54(d)(1), see, *e.g.*, *Rivera* v. *City of Chi.*, 469 F.3d 631, 635 (7th Cir. 2006), that possibility provides no assurance that a good-faith FDCPA plaintiff will avoid cost liability, as the rulings below in the present case make clear.

Within the context of the FDCPA, where even successful suits may produce recoveries that are small in relation to the defendants' costs, Rule 54(d)(1)'s default cost-shifting standard would have far greater potential to deter meritorious claims than under the typical federal statute. By narrowing the circumstances under which costs may be awarded against unsuccessful plaintiffs, Congress alleviated that risk, thereby safeguarding the interests not only of consumers, but of law-abiding debt collectors as well. See 15 U.S.C. 1692(e) (FDCPA serves in part "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged"); *Jerman*, 130 S. Ct. at 1623. To the extent that private enforcement actions are perceived to be unlikely, abusive debt collectors will have greater incentives to violate, or at least "press the boundaries of," the Act's substantive provisions—a result this Court has found "difficult to square" with the Act's goals. *Ibid.* And law-abiding debt collectors could suffer from the lowered operating

costs that their abusive competitors might enjoy in the absence of robust good-faith enforcement.

3. Respondent contends that "[t]o deny a debt collector defendant the right to recover what is presumptively recoverable for a prevailing party under Rule 54(d)(1) would unfairly disadvantage an FDCPA defendant." Br. in Opp. 17. But precisely because Rule 54(d)(1) establishes a default cost-shifting standard, there would have been no need for the FDCPA to address cost awards at all if Congress had been content with the default rule. By enacting Section 1692k(a)(3), Congress expressed its intent that awards of fees and costs in FDCPA cases would be governed by distinctive rules different from the background legal norms that would otherwise apply.

With respect to attorney's fees, Congress displaced the "American Rule," see, *e.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975), by making all losing FDCPA defendants liable for their opponents' reasonable fees. With respect to costs, Congress departed from the default standard set forth in Rule 54(d)(1), both by making cost-shifting mandatory in prevailing-plaintiff cases (see p. 17, *supra*), and by limiting cost awards in prevailing-defendant cases to suits that were brought in bad faith. Thus, while petitioner's proposed approach would deny respondent a cost award to which it might have been entitled under the default standard, there is no reason to suppose that Congress would have viewed that result as unfair.

It is clear that Congress, presumably to encourage the filing of private FDCPA enforcement suits, chose to enact fee- and cost-shifting rules that are more favorable to plaintiffs than to defendants. Under Section 1692k(a)(3), every losing FDCPA defendant is liable for

its opponent's fees and costs, while prevailing defendants may recover fees and costs only if the court finds that the suit was brought in bad faith. That asymmetry reflects an evident (and presumably advertent) departure from Rule 54(d)(1)'s default standard, which applies equally to prevailing plaintiffs and defendants alike.

Like other features of the FDCPA, see, *e.g.*, *Jerman*, 130 S. Ct. at 1611-1624 (holding that "bona fide error" defense conferred by 15 U.S.C. 1692k(c) covers clerical and factual errors but not mistakes of law), Section 1692k(a)(3) reflects Congress's effort to balance competing objectives. The provision avoids the undue deterrent to private enforcement actions that Rule 54(d)(1)'s default standard might create in this context, while authorizing compensation of defendants who incur fees and costs in bad-faith suits. "To the extent Congress is persuaded that the policy concerns identified by [respondent] require a recalibration of the FDCPA's liability scheme, it is, of course, free to amend the statute accordingly." *Jerman*, 130 S. Ct. at 1624. Under the existing statutory scheme, however, an FDCPA plaintiff who brings an enforcement action in good faith is not liable for her opponent's costs, even if the action is ultimately unsuccessful.

CONCLUSION

The judgment of the court of appeals affirming the district court's award of costs should be reversed and the case remanded for further proceedings.

Respectfully submitted.

MEREDITH FUCHS
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
DAVID M. GOSSETT
Assistant General Counsel
KRISTIN BATEMAN
Attorney
Consumer Financial Protection Bureau

WILLARD K. TOM
General Counsel
JOHN F. DALY
Deputy General Counsel
DAVID L. SIERADZKI
Attorney
Federal Trade Commission

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

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v.

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Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* AARP, CONSUMER FEDERATION OF AMERICA, EAST BAY COMMUNITY LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

SETH E. MERMIN
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave
Berkeley, CA 94705

JULIE NEPVEU *
* COUNSEL OF RECORD
AARP FOUNDATION
LITIGATION

MICHAEL SCHUSTER
AARP

601 E STREET, NW
WASHINGTON, DC 20049
jnepveu@aarp.org
(202) 434-2060

Counsel for *Amici Curiae*

AUGUST 3, 2012

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STATEMENT OF INTEREST[1]

Amici curiae are national, nonprofit consumer advocacy organizations that are committed to the enforcement of consumer protection laws. *Amici* have a keen interest in ensuring that federal statutes protecting consumers are not undermined by interpretations that are at odds with congressional intent. In particular, *amici* are concerned that shifting costs to unsuccessful Fair Debt Collection Practices Act ("FDCPA" or "Act") plaintiffs who have brought their cases in good faith will chill enforcement of the Act and injure precisely the financially vulnerable consumers whom Congress sought to protect.

AARP is a nonpartisan, nonprofit organization. As the leading organization dedicated to addressing the needs and interests of people aged 50 and older, AARP is greatly concerned about abusive practices being used to collect the growing level of debt being incurred by older people, many of whom are especially vulnerable to debt collection abuses.

Consumer Federation of America is a non-profit association of nearly 300 nonprofit consumer

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this *amici curiae* brief. Letters reflecting the consent of the parties are being filed with this brief.

organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works to advance consumer interests and pro-consumer policies by researching and reporting consumer issues and behavior, and by advocating about consumer concerns before the federal and state governments. CFA's members are national, state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations. Debt collection problems are the cause of a large number and large percentage of consumer complaints. CFA's annual complaint survey of state and local consumer protection agencies ranks credit and debt collection problems as second only to auto-related complaints. CFA focuses its work on the high-cost small-dollar loan market, where a key feature of many loan products is the coercive debt collection that results from securing loans with borrowers' checks, electronic access to bank accounts, titles to vehicles, funds deposited to prepaid debit cards, or loans secured by expected tax refunds. Private enforcement is necessary to provide remedies for consumers injured by abusive collections.

The East Bay Community Law Center is a nationally recognized, community-based provider of legal assistance to low-income individuals and the largest provider of free legal services in Oakland and the rest of the East Bay. EBCLC's Neighborhood Justice Clinic operates a legal clinic serving more than a thousand clients every year—over a third of whom seek legal help because they are facing debt

collection lawsuits. Many clients have been victims of illegal, often outrageous, collection practices. Filing affirmative lawsuits under the Fair Debt Collection Practices Act is a powerful way to put a stop to these abusive practices. But since all of EBCLC's clients are indigent, the fear of having to pay costs if they were to lose their lawsuit would cause most clients to decide not to file. EBCLC joins this case as *amicus curiae* to prevent that chilling effect.

The National Association of Consumer Advocates is a nonprofit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

The National Consumer Law Center, Inc., is a national nonprofit research and advocacy organization founded in 1969 that focuses on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally recognized expert on consumer protection issues and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to

Congress and state legislatures, administrative agencies, and courts for more than forty years. One of NCLC's primary objectives is to provide assistance to attorneys advancing the interests of their low-income and elderly clients in the area of consumer law. Accordingly NCLC has focused considerable attention on laws to prevent abusive debt collection. The Fair Debt Collection Practices Act has been a major focus of that work. NCLC publishes a comprehensive treatise, *Fair Debt Collection* (6th ed. 2008 & 2009 Supp.) to assist attorneys, creditors and debt collectors in complying with the law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FDCPA, 15 U.S.C. § 1692 *et seq.*, is a carefully designed statute, enacted to protect a particularly vulnerable set of consumers from the practices of a necessary but abuse-ridden industry. The Act's cost and fee shifting provision is tailored to encourage enforcement by consumers through private lawsuits while discouraging lawsuits filed in bad faith. The Tenth Circuit's holding that FDCPA plaintiffs must pay costs whenever they do not prevail interferes with this careful statutory structure. The decision ignores two key features in the design of the FDCPA: the primacy of the private enforcement regime that the statute creates, and the financial vulnerability of the population that the statute is designed to protect.

The need for robust enforcement of the FDCPA is acute. Abuses by debt collectors were

widespread when the FDCPA was enacted. *See* 15 U.S.C. § 1692(a) (citing "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors"). And abuses continue to plague consumers today. Indeed, the debt collection industry generates more complaints to the Federal Trade Commission than any other industry. CFPB, *Annual Report 2012: Fair Debt Collection Practices Act* 6 (2012) (noting FTC received 117,374 complaints about third-party debt collectors in 2011).[2]

The scarcity of public FDCPA enforcement actions confirms the continuing importance of private lawsuits to curb collection abuses. In 2011, though the FTC received more than 117,00 complaints, it brought or resolved only 7 actions against debt collectors—and that total constituted "the highest number of debt collection cases that it has brought or resolved in any single year." CFPB, *Annual Report 2012* at 14.

This enormous enforcement gap illustrates precisely why Congress designed the Act to be enforced by consumers. *See* Sen. Comm. on Banking, Housing and Urban Aff., S. Rep. No. 95-382, 95th Cong 1st Sess., 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699 ("consumers who have been subjected to collection abuses will be enforcing compliance"). Only robust private enforcement can achieve the Act's primary stated purpose: "to

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[2] *Available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf).

eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e).

The enforcement regime Congress enacted struck a careful balance. On the one hand, the Act encourages private enforcement by providing fees and costs to prevailing plaintiffs and denying them to prevailing defendants in routine cases. *See* 15 U.S.C. § 1692k(a)(3). On the other hand, the Act protects scrupulous debt collectors from liability for *bona fide* errors, *see* 15 U.S.C. § 1692k(c), and provides fees and costs for defending suits brought in bad faith, *see* 15 U.S.C. § 1692k(a)(3). The provision limiting plaintiffs' liability for costs makes particular sense in light of the *bona fide* error defense: were the statute interpreted otherwise, plaintiffs could be responsible for defendants' costs in cases where the debt collector had in fact violated the FDCPA.

Moreover, limiting defendants' cost recovery to suits brought in bad faith is consistent with the Act's concern for the particular population it was designed to protect: debtors. By definition, debtors do not have the money to pay defendants' costs if they do not prevail—costs which can amount, as they did in this case, to thousands of dollars. *See* Pet. App. 29a (showing $4,543 in costs awarded). The FDCPA's limitation on awards to prevailing defendants avoids the painful irony of vulnerable debtors routinely being saddled with additional debt through the operation of a statute designed to protect them.

Without that limitation, it is unlikely that many consumers would risk bringing suit—an outcome directly at odds with the structure and design of the FDCPA. The Tenth Circuit's interpretation of the Act's cost provision interferes with a carefully designed enforcement regime. *Amici* urge the Court to reverse that decision and to hold that costs may be shifted to the unsuccessful FDCPA plaintiff only if the lawsuit was filed in "bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3).

ARGUMENT

I. ROBUST PRIVATE ENFORCEMENT OF THE FDCPA IS NECESSARY TO CURB WIDESPREAD AND INCREASING DEBT COLLECTION ABUSES.

The FDCPA was designed to be readily enforceable by consumers who are victims of debt collection abuses. The need for effective enforcement of the Act may be even more pressing today than it was in 1977 when the FDCPA was enacted. Debt loads have increased exponentially and technological advances have transformed the collections industry, exposing more consumers to abuses. The wisdom of the congressional design, encouraging rather than chilling private enforcement, is more salient than ever.

A. Market Changes And Technological Advances Have Increased Collection Abuses, Further Intensifying The Need To Encourage Private Enforcement.

Private enforcement is vital especially in light of the dramatic changes in the financial markets in the years since the FDCPA was enacted. The increase in reported abuses corresponds to a period first of increased consumer debt and then of a sharp economic downturn. *See* Kathleen W. Johnson, *Recent Developments in the Credit Card Market and the Financial Obligations Ratio*, 91 Fed. Reserve Bulletin 473, 474 (2005).[3] These conditions have created an enormous amount of delinquent debt which has been and will continue to be subject to collection efforts. Clarifying the enforcement regime governing those actions, and retaining the safeguards inherent therein, becomes a matter of the utmost public importance.

1. Recent Years Have Witnessed An Upsurge Of Unaffordable Consumer Debt And A Corresponding Increase In Collection Cases.

At the beginning of 1977, consumers carried revolving debt worth approximately $32 billion; by 2007 that number had increased more than 28 times to $913 billion. *Statistical Release - Consumer Credit*

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[3] *Available at* http://www.federalreserve.gov/pubs/bulletin/2005/autumn05_lead.pdf.

Historical Data (Revolving), Fed. Reserve Board.[4] Not only do Americans carry more credit card debt than ever before, but more people are being buried in what may be considered *unaffordable* debt, in which debt payments exceed 40% of their income. This increase is especially acute for older age groups. *See* Emp. Benefit Research Inst. Notes, *Debt of the Elderly and Near Elderly, 1992–2007*, Vol. 30, No. 10, 6 (2009) (finding that the proportion of near-elderly and elderly families with debt greater than 40% of income increased from 7.3 percent in 2004 to 9.9 percent in 2007).[5] Some of this debt has resulted from dubious credit practices. *See Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers, Before the S. Comm. on Banking, Housing & Urban Affairs*, 110th Cong. 3 (Jan. 25, 2007) (statement of Prof. Elizabeth Warren) ("A debtor could pay nearly 100% of what she owed every year for the rest of her life, and thanks to the traps built in to her credit card, she would keep paying until she died—and still not pay off her card."); U.S. Gov't Accountability Office, GAO-06-929, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* 16 (2006) (noting problems);[6] Credit Card Accountability

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[4] *Available at* http://www.federalreserve.gov/releases/g19/HIST/cc_hist_r_levels.html (last updated July 9, 2012).

[5] *Available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-Oct09.DebtEldly.pdf.

[6] *Available at* http://www.gao.gov/new.items/d06929.pdf.

Responsibility and Disclosure Act of 2009, Pub. L. 111-24, Title I, § 108, 123 Stat. 1743 (May 22, 2009) (15 U.S.C. § 1602) (implementing reforms).

Whatever the reason for the upsurge, the enormous levels of unaffordable consumer debt have caused collections activity to increase sharply. *See 2011 Credit Card Debt Study*, Card Hub (noting banks charged off $83.2 billion in credit card debt in 2009, and $75.1 billion in 2010).[7] This massive debt will be subject to collection attempts—and the abuses that accompany such collections—for years to come.

2. Collection Abuses May Stem From Attempts To Collect Invalid Or Otherwise Uncollectible Debt.

Significant collection abuses stem from attempts to collect invalid or otherwise uncollectible debt. FTC, *Annual Report 2011* at 7 (reporting this category of consumer complaint as the second most prevalent, after abusive contacts, for the third year in a row).[8] For example, collectors regularly pursue debts resulting from identity theft and other types of fraud, debts that were discharged in bankruptcy, and debts owed by decedents. *Id.* *See* Nat'l Consumer Law Ctr., *The Debt Machine: How the Collection*

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[7] *Available at* http://education.cardhub.com/q1-2011-credit-card-debt-study/ (last visited July 25, 2012).

[8] *Available at* http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf.

Industry Hounds Consumers and Overwhelms Courts 11 (2010).[9]

Though victims of identity theft and fraud are not legally liable for unauthorized charges, they may nevertheless be subject to collection efforts. FTC, *Annual Report 2011* at 7.

Similarly, debt that has been discharged in bankruptcy is regularly pursued by collectors. *Id.* *See also* Jessica Silver-Greenberg, *Debts Go Bad, Then It Gets Worse,* Wall St. J. (Dec. 23, 2011) (describing "court-appointed auditor's conclu[sion] . . . that Capital One pursued 15,500 'erroneous claims' seeking money previously erased by a bankruptcy-court judge").[10]

Collection of decedents' debts from families and survivors who are not legally obligated to pay also contributes to collection abuses. *See* Statement of Policy Regarding Communications in Connection With the Collection of Decedents' Debts, 76 Fed. Reg. 44,915 (July 27, 2011); *see also* Press Release, FTC, FTC Issues Final Policy Statement on Collecting Debts of the Deceased (July 20, 2011).[11]

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[9] *Available at* http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf.

[10] *Available at* http://online.wsj.com/article/SB10001424052970203686204577114530815313376.html#printMode.

[11] *Available at* www.ftc.gov/opa/2011/07/fdcpa.shtm.

3. The Economic Downturn Has Exposed Many Consumers To Abusive Debt Collection.

The recent economic downturn has increased consumers' financial vulnerability and increasingly exposed them to abusive collections. *See* FTC, *Repairing A Broken System: Protecting Consumers In Debt Collection Litigation And Arbitration* i (2010) (linking the weakened economy to increased collection activity).[12] In 2009, late payments on credit card debt reached an all-time high of 6.6 percent, up from a relatively stable 4.4 percent rate of delinquency since 1991. GAO at 4-5; *see also* FTC, *Collecting Consumer Debts: The Challenges of Change* 12 (2009)[13] (citing Al Yoon, *US Credit Card Delinquencies at Record Highs—Fitch*, Reuters (Feb. 4, 2009)).[14]

4. Technological Advances Have Spurred Widespread And Systemic Debt Collection Abuses.

The collections industry has thrived and evolved over the past few decades, spurred by

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12 *Available at* www.ftc.gov/os/2010/07/debtcollection report.pdf; *see also* GAO at 28-29.

13 *Available at* http://www.ftc.gov/bcp/workshops/ debtcollection/dcwr.pdf.

14 *Available at* http://www.reuters.com/articlePrint? articleId=USN0428871920090204.

financial and technological advances. These advances have also increased collection abuses.

> Today's collection industry is markedly different from the industry contemplated by the FDCPA 35 years ago. Key new economic players—debt buyers and collection law firms—have entered the industry since its inception. Additionally, the industry has seen dramatic technological advances. Forty years ago, collection activities depended on typewritten collection notices and local phone calls. Collection firms may now use sophisticated analytics to identify the specific debtors to target. Predictive dialers and internet telephony have lowered the cost of contacting consumers so that a small collections firm economically can reach out to hundreds of thousands of consumers. Database improvements have facilitated the sale of debt and created a new sub-industry of debt buyers. But, even as the industry has changed, abuses remain an issue. The collection industry continues to be a top source of complaints to the FTC.

CFPB, *Annual Report 2012* at 4.

Debt buyers, companies that purchase (and often re-sell) large portfolios of delinquent debt for

pennies on the dollar, have become a particular source of collections abuse. *See* Rachel Terp & Lauren Bowne, *Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now*, Consumers Union 2 (2011).[15] The value of a particular portfolio is based upon the likelihood that a debtor will succumb to the pressure exerted by the threat or entry of a judgment rather than the legitimacy of the debt. *See* FTC, *Challenges of Change* at 20. Multiple re-sales of the debt increases chances for recordkeeping errors and the likelihood that the collector will have misidentified the debtor or sued beyond the statute of limitations. FTC, *Repairing a Broken System* at 5, 21, 29.

Debt buyers have been particularly prone to practices that predictably result in FDCPA violations. For example, debt buyers generally purchase only an electronic spreadsheet with basic information about a debt: they do not purchase the actual accounts or any transaction history. *See* FTC, *Repairing A Broken System* at i. According to the FTC, "[w]hen accounts are transferred to debt collectors, the accompanying information often is so deficient that the collectors seek payment from the wrong consumer or demand the wrong amount from the correct consumer." FTC, *Challenges of Change* at 22. The information necessary to verify disputed debts or prove a contested amount, especially for stale debt, is unavailable to a typical debt buyer from any source. *Id. at 23.*

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[15] *Available at* http://www.ebclc.org/documents/Past_Due_Report_2011.pdf.

Debt buyers are also known to resell debt which is the result of identity theft, settled, discharged in bankruptcy, or which has been paid in full. *Id. at* 64. Each time such an invalid debt is re-sold, a debtor must re-engage in a frustrating and often futile process of disputing the debt or defending another lawsuit. This type of debt has been dubbed "zombie debt" for apt reasons; it is hard to defend against and it seemingly never dies. *See, e.g.*, Eileen Ambrose, *Zombie Debt,* Balt. Sun (May 6, 2007);[16] Liz Pulliam Weston, *The Basics: 'Zombie Debt' is Hard to Kill*, MSN Money (July 7, 2006).[17]

With increasing frequency, debt collectors have made use of the courts to collect on time-barred or already paid-off debt, despite having insufficient evidence to prove their claims. FTC, *Challenges of Change* at 24, 55. *See* Judicial Council of Cal., *Trial Court Caseload Increases to Over 10 Million Filings, Data Points* 1 (2010) (reporting "[a]n estimated 96,000 consumer debt-collection cases were filed in 2009 in Alameda, Contra Costa and San Francisco Counties alone, up from about 53,665 in 2007.");[18] Urban Justice Ctr., *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 1 (2007) (annual filing of debt

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16 *Available at* http://articles.baltimoresun.com/2007-05-06/business/0705060084_1_zombie-debt-debt-buyers-consumer-debt.

17 *Available at* http://articles.moneycentral.msn.com/SavingandDebt/ManageDebt/ZombieDebtCollectorsDigUpYourOldMistakes.aspx.

18 *Available at* http://www.courts.ca.gov/datapoints10.pdf.

collection cases in New York City increased by more than 60% between 2002 and 2007).[19] Lacking adequate documentation to prove their cases, debt buyers have supported their judicial collections efforts with false affidavits. *See Vassalle v. Midland Funding, LLC*, No. 3:11-CV-00096, 2011 WL 3557045 (N.D. Ohio Aug. 12, 2011) (settling class action with 1.4 million consumers involving allegations of "robo-signing" of affidavits falsely claiming personal knowledge concerning the underlying debt collection lawsuits); *see also Midland Funding, LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio 2009) (describing the challenged affidavit production practice); Tom Shean, *Debt Collection Industry's Methods Draw Scrutiny*, Virginian-Pilot (Jan. 30, 2011) (discussing use of affidavits ostensibly signed by employee who had been dead for over 10 years).[20]

Judicial collections have become increasingly prevalent because of the probability that the debtor will not defend the lawsuit. Claudia Wilner et al., *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, Neighborhood Econ. Dev. Advocacy Project 6 (2010) (noting that ninety-five percent of 457,322 lawsuits filed by twenty-six debt buyers against people residing in low- or moderate-income neighborhoods

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19 *Available at* http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf.

20 *Available at* http://hamptonroads.com/2011/01/debt-collection-industrys-methods-draw-scrutiny.

ended in default judgments, and not a single person in the study was represented by counsel);[21] Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, Wall St. J. (Nov. 28, 2010) (reporting that industry estimates 94% of collections end in default and that "[t]he majority of borrowers don't have a lawyer, some don't know they are even being sued, and others don't appear in court, say judges.").[22] The high default rate is due in part to widespread service of process abuses. *See* FTC, *Repairing a Broken System* at 10.

The collectors also benefit from the fact that the dollar amount at issue in a typical collection lawsuit is relatively small, permitting the cases to be filed, in many states, in small claims courts with less judicial oversight and relaxed pleading and evidentiary requirements. Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Md. J. of Bus. and Tech. L. 259, 263 (2011); Michael Rezendes et al., *Debtors' Hell, Dignity Faces a Steamroller*, Bos. Globe (July 31, 2006) (noting courtroom where "collection lawyers appear to be in charge—with no oversight by judicial officials").[23]

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21 *Available at* http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf.

22 *Available at* http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html.

23 *Available at* http://www.boston.com/news/special/spotlight_debt/part2/page1.html.

B. Limited Public Agency Enforcement of the FDCPA Has Not Supplanted The Need For Private Enforcement.

Even with targeted public enforcement actions to combat misconduct by large debt collectors, private lawsuits under the FDCPA are vital to curb widespread abuses that continue to cause substantial harm. *See, e.g., McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2010) (affirming judgment against debt collector for collecting time-barred debt and serving requests for admission containing false information on a *pro se* debtor with disabling head injuries).

The continuing need for robust private enforcement is brought into sharp relief by the fact that, despite the debt collection industry's status as the most complained-about industry in the nation for nearly 15 consecutive years,[24] the FTC has never

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[24] Complaints about debt collectors to the FTC about third-party debt collectors ranked second only to complaints about credit bureaus in 1997 and 1998. FTC did not report complaints by industry. *See* FTC, *Annual Report 1998*, 2, *available at* http://www.ftc.gov/os/1998/03/fdcp98se.pdf; FTC, *Annual Report 1999*, 2, *available at* http://www.ftc.gov/os/statutes/fdcpa/senate99.pdf. Since 2000, the FTC consistently has reported that it receives more complaints about debt collection than any other industry. *See* FTC, *Annual Report 2000*, *available at* http://www.ftc.gov/os/statutes/fdcpa/fdcpa2000rpt.shtm; FTC, *Annual Report 2001*, *available at* http://www.ftc.gov/os/2001/03/fdcpaar2000.htm; FTC, *Annual Report 2002*, *available at* http://www.ftc.gov/os/2002/06/fdcpaar2002.htm; FTC, *Annual Report 2003*, 3, *available at* http://www.ftc.gov/os/statutes/fdcpa/fdcpa2003rpt.htm; FTC,

initiated or resolved more than 7 actions against debt collectors in a given year. CFPB, *Annual Report 2012*, at 14. Indeed, in typical years, the Commission has begun or concluded only 2 or 3 actions. *See, e.g.*, FTC, *Annual Report 2004* at 8; FTC, *Annual Report 2005* at 8-9; FTC, *Annual Report 2006* at 8; FTC, *Annual Report 2007* at 8-9. In contrast, 12,018 private FDCPA lawsuits were filed during 2011. *Year-End Lawsuit Numbers Revised Upward, Reach 12,000*, Collections & Credit Risk (Feb. 24, 2012).[25]

In 2010, Congress conferred the Consumer Financial Protection Bureau with authority to enforce and implement the FDCPA. *See* Consumer Financial Protection Act of 2010, Title X, Dodd-

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Annual Report 2004, 2, *available at* http://www.ftc.gov/os/2004/03/2004fdcpareport.pdf; FTC, *Annual Report 2005*, 2-3, *available at* http://www.ftc.gov/reports/fdcpa05/050729fdcparpt.pdf; FTC, *Annual Report 2006*, 2-3 *available at* http://www.ftc.gov/os/2006/04/P0648042006FDCPAReport.pdf; FTC, *Annual Report 2007*, 2-3, *available at* http://www.ftc.gov/reports/fdcpa07/P0748032007FDCPAReport.pdf; FTC, *Annual Report 2008*, 4, *available at* http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf; FTC, *Annual Report 2009*, 4, *available at* http://www.ftc.gov/os/2009/02/ P094804fdcpareport. pdf; FTC, *Annual Report 2010*, 3, *available at* http://www.ftc.gov/os/2010/04/ P104802fdcpa2010annrpt.pdf; FTC, *Annual Report 2011* at 4; The FTC in 2012, *Stats & Data*, *available at* http://www.ftc.gov/os/highlights/2012/img/FTCStatsData_ 2012.pdf. *See also* News Release, Nat'l Ass'n of Attorneys General, Top 10 List of Consumer Complaints for 2008 (Aug. 31, 2009), *available at* http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php.

[25] *Available at* https://collectionscreditrisk.com+year-end-lawsuits-revised-upward-reach-3009740-1.html.

Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203 (12 U.S.C. 5301). In one of its first assertions of supervisory authority over non-bank entities, the CFPB published notice of its intent to supervise the debt collection industry. *See* Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9597 (Feb. 17, 2012) ("In 2011, approximately 30 million individuals, or 14 percent of American adults, had debt that was subject to the collections process."). This new regulatory authority over debt collectors will not, however, obviate the need for vigorous private enforcement of the FDCPA. The CFPB has proposed supervising only collection agencies with more than $10 million in annual receipts. 77 Fed. Reg. at 9599. The great majority—more than 95%—of the nation's estimated 4,700 collection agencies fall below that threshold. *Id.* Moreover, the Bureau has delayed finalizing its rule as it considers the collection industry's proposal to raise the monetary threshold even higher, with concomitantly narrower coverage. *Id.*; *see Large Market Participation Definition Delayed*, Collections & Credit Risk (July 19, 2012) (noting industry recommendation of $250 million threshold).[26] The need for private enforcement remains acute.

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[26] *Available at* http://www.collectionscreditrisk.com/news/large-market-participant-definition-delayed-3011333-1.html.

II. THE FDCPA'S COST-SHIFTING PROVISION IS CAREFULLY DESIGNED TO PROTECT BOTH VULNERABLE CONSUMERS AND CONSCIENTIOUS DEBT COLLECTORS.

The FDCPA's cost-shifting provision, 15 U.S.C. § 1692k(a)(3), works to ensure both that the Act's consumer protection provisions will be enforced and that scrupulous debt collectors will be free from lawsuits brought in bad faith or liability based on inadvertent errors.

First, by shielding unsuccessful but good-faith plaintiffs from the potential burden of paying defendants' fees and costs, the provision protects against the risk that consumers will be deterred from enforcing the Act by the prospect of sinking further into debt if they lose their case. Congress acted to protect debtors against an industry that it viewed as having little or no market incentive to treat them properly, and a strong "incentive to collect by any means." S. Rep. No. 95-382, at 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (noting that "[u]nlike creditors, who generally are restrained by the desire to protect their good will," third-party debt collectors "are likely to have no future contact with the consumer and are often unconcerned with the consumer's opinion of them.").

A. The Cost-Shifting Provision Enhances Enforcement While Discouraging Suits Brought In Bad Faith.

Congress and this Court have long recognized the power of cost-shifting statutes both to encourage and to discourage lawsuits. Just as shifting costs and fees to prevailing plaintiffs in the ordinary case will encourage suits to vindicate the public interest, so will awarding costs and fees to defendants have a chilling effect on the initiation of such suits. Further, shifting costs and fees to defendants in frivolous cases can discourage bad-faith and harassing lawsuits. *See Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 418 (1978).

This Court has acknowledged the importance Congress placed on encouraging vulnerable consumers to bring private lawsuits to enforce compliance with the Act. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S. Ct. 1605, 1624 (2011) (noting "the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement"). Congress' departure from the more common "prevailing party" standard of Rule 54(d) protects FDCPA plaintiffs from bearing the costs of suit in the event their good-faith claims are unsuccessful, while at the same time discouraging suits brought in bad faith.

B. The Limitation on Cost Awards To Prevailing Defendants Advances The Goal of Protecting Financially Vulnerable Consumers.

Section 1692k(a)(3)'s limitation on cost awards to prevailing defendants flows naturally from the goals of the FDCPA. It avoids the risk that debtors who file in good faith will be saddled with additional debt.

If consumers in debt were required to bear defendants' costs of suit for unsuccessfully seeking to enforce the FDCPA, they would likely choose not to file suit in the first place. *Cf. Fleischmann v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (acknowledging "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.")

This caution is particularly sensible in light of the FDCPA's *bona fide* error provision. 15 U.S.C. § 1692k(c) (providing defense from liability if a collector can show "the violation was not intentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error"). If debt collectors maintain such procedures, they can avoid liability for unintentional acts, such as accidentally calling a consumer in a different time zone after hours, or mistakenly sending a dunning letter to a consumer who has requested no further contact.

For the consumer, though, the provision may be a sizable deterrent. Given the fact that a consumer can sue in good faith, prove a violation, and nonetheless lose the case because the violation turns out to have been a *bona fide* error, the FDCPA limitation on cost awards to bad faith suits carries real significance. The facts supporting the *bona fide* error defense will rarely if ever be available to the plaintiff in advance of suit. Without the limitation on cost awards, the potential risk of incurring more debt through a cost award would surely discourage a great many indebted consumers with legitimate FDCPA claims from bringing suit.

C. The FDCPA Protects A Particularly Vulnerable Set Of Consumers.

Congress understood that the consumers protected by the FDCPA are particularly vulnerable. *See* S. Rep. No. 95-382, at 3 (noting consumers often are subject to collections due to an "unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce."). *See* Robert M. Hunt, *Collecting Consumer Debt in America,* Fed. Reserve Bank, Phila. Bus. Rev. 13 (Q2 2007) (reporting 28% of debt collection revenue comes from healthcare related debts);[27] Jose Garcia & Tamara Draut, Demos, *The Plastic Safety Net: How Households are Coping in a Fragile Economy* (2009) (finding that medical debt and unemployment

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[27] *Available at* http://www.phil.frb.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf.

are significant contributors to household credit card debt loads);[28] David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007*, 122 Am. J. Med. 741, 743 (2009) (finding a majority (62.1%) of all bankruptcies in 2007 had a medical cause).[29] Bankruptcy filings among people age 55 and older have risen sharply in recent years, with the greatest increases among those 75 and older (up 566.7% between 1991 and 2007) and those ages 65 to 74 (up 177.8%); Deborah Thorne et al., *Generations of Struggle*, AARP Pub. Policy Inst. 1 (2008).[30] These difficult circumstances limit their ability to enforce compliance with the FDCPA.

Debtors' fears, lack of sophistication and limited knowledge of the law further weaken their ability to enforce compliance with the FDCPA. *See* FTC, *Challenges of Change* at 17. Most consumers, and particularly those who are financially vulnerable, fear encounters with the legal system, and may pay debts they dispute simply to avoid the consequences—both real and imagined—of going to court. *See Zimmerman v. Portfolio Recovery Assocs.*, LLC, 276 F.R.D. 174 (S.D.N.Y. 2011) (debt collection company sent "Pre-Suit Package" containing pseudo-legal documents misleading consumers about the imminence of suit). For example, many older debtors

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[28] *Available at* http://www.demos.org/sites/default/files/publications/PlasticSafetyNet_Demos.pdf.

[29] *Available at* http://pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf.

[30] *Available at* http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf.

believe they will go to jail if summoned to court. *See* Donna S. Harkness, *When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 Elder L.J. 1, 3-4 (2008); Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 1 Elder L.J. 135, 135-37, 151-56 (2008).

Because of the dire consequences of having a judgment entered, a debtor may easily be bullied into paying even an invalid debt. As explained by one commentator,

> [T]he judgment will impose costs on the consumer by damaging the consumer's credit rating. . . [which] does more than merely raise the consumer's cost of credit. A damaged credit score can make it difficult to rent an apartment, find a job, or even purchase automobile insurance. . . . credit reports typically do not record the filing of the lawsuit, but they do record judgments. Therefore, a civil filing serves as a credible threat to inflict harm on the defendant and may induce the defendant to pay.

Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts*, 60 Fla. L. Rev. 1, 20 (2008).

Moreover, collectors know that older people, 80 percent of whom are homeowners, are susceptible to threats that they may lose their homes. Older consumers living alone are often targets of abusive tactics because they may be socially isolated; in addition, because they are at home during daytime hours, they are more accessible to collectors. *See* Charles Duhigg, *Bilking the Elderly with a Corporate Assist,* N.Y. Times, May 20, 2007, at A1.[31] Additionally, the ability of some older people to make financial decisions or to remember the details of stale debts may be impaired by cognitive decline. *See* Naomi Karp et al., *Protecting Older Investors: The Challenge of Diminished Capacityi,* AARP Pub. Policy Inst. 11 (2011).[32] As a result, older people sometimes agree to pay on debts they had already paid in full or never owed in the first place, such as debts of a deceased spouse.

Bullying a person into paying an invalid or discharged debt does not make an abusive collection practice valid or defensible. Congress knew collectors could exploit the financial, educational, and circumstantial vulnerabilities of debtors. The limitation on cost awards to prevailing defendants encourages consumers to enforce the FDCPA without fear that the costs of that effort will add to their debt.

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[31] *Available at* http://www.nytimes.com/2007/05/20/business/20tele.html?pagewanted=all.

[32] *Available at* http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf.

CONCLUSION

The Tenth Circuit's interpretation of the FDCPA's cost shifting provision runs counter to both the structure and the purpose of the Act. Because it would upset the carefully articulated enforcement regime of the FDCPA, that decision should be reversed.

Respectfully submitted,

SETH E. MERMIN
PUBLIC GOOD LAW CENTER
3130 Shattuck Ave
Berkeley, CA 94705

JULIE NEPVEU *
* COUNSEL OF RECORD
AARP FOUNDATION
LITIGATION

MICHAEL SCHUSTER
AARP

601 E STREET, NW
WASHINGTON, DC 20049
jnepveu@aarp.org
(202) 434-2060

Attorneys for *Amici Curiae*

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROY T. ENGLERT, JR.*
MARK T. STANCIL
DANIEL N. LERMAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

**Counsel of Record*

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Law Library

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BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

ACA International is the nation's leading association of credit and collection professionals. Founded in 1939, and based in Minneapolis, Minnesota, ACA represents approximately 5000 members (third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates) ranging in size from small businesses to large, publicly held corporations. ACA establishes ethical standards, provides training and educational products and services, and offers compliance support regarding state and federal laws and regulations governing the industry, including the Fair Debt Collection Practices Act (FDCPA) and other statutes.

ACA has filed this *amicus curiae* brief because of the importance of this case to its membership. A debt collector that successfully defends against an FDCPA lawsuit often incurs significant costs in connection with that defense. And such lawsuits have been filed in alarming numbers, particularly in recent years—the vast majority by a small handful of lawyers whose explicit business model is to extract as many nuisance-value settlements as possible. Eliminating

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[1] The parties' letters of consent to the filing of this *amicus* brief have been filed with the Clerk. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

the normal award of costs when defendants prevail would encourage even more such meritless suits. ACA's members, therefore, have a substantial interest in whether district courts may award prevailing FDCPA defendants costs under Federal Rule of Civil Procedure 54(d).

SUMMARY OF ARGUMENT

Rule 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." The FDCPA authorizes courts to award defendants attorney's fees and costs "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). The court of appeals correctly held that Section 1692k(a)(3) does not strip courts of their authority to award prevailing defendants costs pursuant to Rule 54(d) in cases that were not brought in bad faith and for the purpose of harassment.

I. Section 1692k(a)(3) supplements—but does not supplant—Rule 54(d)'s baseline presumption that prevailing parties should recover their costs. Petitioner's arguments to the contrary are without merit. First, she contends that the court of appeals' interpretation renders Section 1692k(a)(3)'s reference to "costs" superfluous. But Section 1692k(a)(3) does not grant courts the same power they already possess under Rule 54(d); rather, it grants courts *additional* authority. Specifically, Section 1692k(a)(3) permits courts to award costs to *all* defendants (not just to prevailing defendants) and to award *all* litigation

costs (not just "taxable" costs) in cases brought in bad faith and for the purpose of harassment.

Second, petitioner asserts that, because Section 1692k(a)(3) describes one context in which defendants may recover costs, it necessarily describes the only context in which defendants can recover costs. But Section 1692k(a)(3) must be read in conjunction with Rule 54(d). Although the *expressio unius* canon suggests that Section 1692k(a)(3) does not *by itself* authorize costs to all prevailing defendants, it says nothing about whether another rule provides an independent source of authority for such costs. In this case, Rule 54(d) provides that independent source of authority.

Finally, petitioner urges an interpretation of "provides otherwise" that would encompass any statute that authorizes costs in "other circumstances than" those described in Rule 54(d). Pet. Br. 16. A statute "provides otherwise," however, only if it *contradicts* Rule 54(d)—complementing Rule 54 in "other circumstances" is not the same as providing otherwise. Because nothing in Section 1692k(a)(3) contradicts Rule 54(d), which grants courts discretion to award taxable costs to prevailing parties, that baseline principle remains intact.

II. Petitioner's flawed interpretation would promote meritless FDCPA lawsuits and undermine the purposes of the FDCPA. Lawyers already file a staggering number of FDCPA cases each year—more than 12,000 in 2011 alone. The vast majority of those cases are filed by a small handful of lawyers who file these cases (sometimes by the hundreds each year) in the hopes of extracting as many nuisance-value

settlements as possible. Facing that onslaught of lawsuits, law-abiding debt collectors often settle even frivolous claims rather than incur crippling litigation expenses. It is usually far cheaper to settle a meritless lawsuit than to win it outright. The proliferation of FDCPA lawsuits has done little to help consumers, but it has undeniably had a harsh impact on law-abiding debt collectors.

Petitioner's rule would exacerbate the problem. The potential for cost-shifting to prevailing parties serves as a modest—but important—check on meritless lawsuits. Petitioner would remove even that limited disincentive, opening the floodgates to even more meritless FDCPA claims. Congress passed the FDCPA to ensure "that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Denying costs to prevailing FDCPA defendants would thwart that goal by punishing debt collectors whose only sin was that they chose to defend—and won—a lawsuit.

ARGUMENT

I. THE FDCPA DOES NOT DISPLACE RULE 54(d)'S PRESUMPTION THAT PREVAILING PARTIES SHOULD RECOVER TAXABLE COSTS

Rule 54(d) states that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Although courts have discretion whether to award costs under Rule 54(d), *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997,

2001 (2012), "the Rule creates a strong presumption that the prevailing party will recover costs under the Rule," 10 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 54.101[1][a] (3d ed. 2012).

Petitioner contends that Rule 54(d)'s cost-shifting provision is displaced by Section 1692k(a)(3), which provides:

> [I]n the case of any successful action to enforce the foregoing liability, [the debt collector is liable for] the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692k(a)(3).

Respondent correctly explains that Section 1692k(a)(3) does not "provide otherwise." Resp. Br. 11-29. Rather, that provision simply confirms that a court may award costs, in addition to attorney's fees, when a plaintiff brings an FDCPA suit in bad faith and for the purpose of harassment. We focus here on three flawed arguments advanced by petitioner and the government.

1. Petitioner and the government contend that it would be superfluous to authorize costs in cases brought in bad faith if Congress had intended to leave Rule 54(d)'s cost presumption intact. See Pet. Br. 7; U.S. Br. 21. But Section 1692k(a)(3) does not merely confer upon courts the same authority they already possess under Rule 54(d). Rather, it grants

courts *additional* authority to award costs. It does so in at least two respects.

First, Rule 54(d) authorizes courts to award costs only to "prevailing part[ies]." Section 1692k(a)(3) is not so limited. It provides that *any* "defendant"—not just prevailing defendants—may recover costs if the court finds that the action was brought in bad faith and for the purpose of harassment. The statute therefore authorizes costs if, for example, a plaintiff voluntarily dismisses a bad-faith case. In that situation, the defendant would not qualify as a prevailing party under Rule 54(d) because there would not have been a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. W. *Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001); see *Lorillard Tobacco Co.* v. *Engida*, 611 F.3d 1209, 1215 (10th Cir. 2010) ("Voluntary dismissal of an action ordinarily does not create a prevailing party."). Section 1692k(a)(3)'s cost-shifting provision therefore sets forth additional circumstances in which district courts may award costs. But it does not strip courts of their authority to award costs to prevailing parties under Rule 54(d).

Second, the surplusage argument advanced by petitioner and the government assumes that Section 1692k(a)(3) and Rule 54(d) provide for the exact same cost awards. But Section 1692k(a)(3) grants courts discretion to award costs over and above those authorized by Rule 54(d). Rule 54(d) authorizes only "taxable" costs—*i.e.*, those specifically enumerated in 28 U.S.C. § 1920. *Taniguchi*, 132 S. Ct. at 2001-02 (2012). "Taxable costs are a fraction of the non-taxable expenses borne by litigants for attorneys, experts, consultants, and investigators." *Id.* at 2006.

Statutes that authorize both attorney's fees and costs in cases of bad faith, however, permit courts to award *all* litigation expenses to the prevailing party—not just the taxable costs authorized by Rule 54(d).

The Electronic Funds Transfer Act (EFTA), for example, contains a cost-shifting provision that is nearly identical to Section 1692k(a)(3). It provides: "On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1693m(f). In *Moore* v. *Southtrust Corp.*, 392 F. Supp. 2d 724 (E.D. Va. 2005), the district court held that Section 1693m(f) authorized it to award both taxable and nontaxable costs. "The purpose of [S]ection 1693m(f), which provides for costs and reasonable attorney's fees when a suit is brought in bad faith," the court explained, "is to compensate the defendant for its litigation expenses, not just its taxable costs." *Id.* at 735. Courts have held that FDCPA Section 1692k(a)(3) similarly permits courts to award non-taxable costs in addition to those authorized by Rule 54(d). See *Giovannoni* v. *Bidna & Keys*, 255 F. App'x 124, 126 (9th Cir. 2007); *McNall* v. *Credit Bureau of Josephine County*, No. 07-3075, 2011 WL 711095, at *6 (D. Or. Feb. 22, 2011).

Thus, in authorizing both attorney's fees and costs in FDCPA cases brought in bad faith, Congress was not, as the government suggests, merely "confer[ring] upon district courts a subset of the authority they already possess" under Rule 54(d). U.S. Br. 21. Rather, Congress was conferring on district courts authority *beyond* that conferred by the Rule: the

power to award costs to defendants irrespective of whether they are prevailing parties, and the authority to award total litigation costs, not just taxable costs. The fact that Section 1692k(a)(3) grants district courts that additional authority in a subset of cases—*i.e.*, those brought in bad faith and for the purpose of harassment—does nothing to displace Rule 54(d)'s baseline presumption that prevailing parties should recover taxable costs in cases that were not brought in bad faith and for the purpose of harassment.

In any event, Congress frequently creates overlapping rights, particularly when acting out of an abundance of caution. See Resp. Br. 23-24. As this Court has explained, "[r]edundancies across statutes are not unusual events in drafting," and courts should therefore give effect to redundant or overlapping provisions "so long as there is no positive repugnancy between" the provisions. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (internal quotation marks omitted); *Mallard* v. *U.S. Dist. Ct.*, 490 U.S. 296, 307 (1989) ("Statutory provisions may simply codify existing rights or powers."). That Section 1692k(a)(3) grants *some* rights that are also conferred by Rule 54(d) is no reason to read Section 1692k(a)(3) as tacitly displacing Rule 54(d) in its entirety.

2. The government relies on a faulty application of the *expressio unius* canon. According to the government, because Section 1692k(a)(3) describes *one* context in which defendants may recover costs—when the action was brought in bad faith and for the purpose of harassment—Section 1692k(a)(3) necessarily describes the *only* context in which prevailing

defendants may recover costs. U.S. Br. 18-19. Petitioner similarly argues that, because Section 1692k(a)(3) states that courts "may" award costs in cases brought in bad faith, it implicitly provides that courts "may not" award costs in other circumstances. Pet. Br. 9-11.

At most, however, the *expressio unius* canon simply suggests that Section 1692k(a)(3) does not *by itself* authorize costs outside the circumstances described in the statute. But Section 1692k(a)(3) does not exist in a vacuum. Rather, it must be read in conjunction with Rule 54(d), an independent source of authority that creates a baseline rule that prevailing parties—including defendants—recover costs. And nothing in Section 1692k(a)(3) purports to displace that rule.

The government also contends that, "given the specificity with which Congress addressed cost awards to prevailing FDCPA defendants," Section 1692k(a)(3) implicitly describes the exclusive circumstances under which courts could award costs to prevailing defendants—and therefore "provides otherwise." U.S. Br. 19. But it is not true that Rule 54(d) is "general" and Section 1692k(a)(3) is "specific" as that canon is typically used. Both provisions are "specific" in awarding costs to certain parties in specified circumstances. That Rule 54(d) makes explicit its lack of effect in the face of a conflicting policy does not make it "general"—it simply asks the question whether there is, in fact, conflict with another provision.

This Court's recent decision in *Bloate* v. *United States*, 130 S. Ct. 1345 (2010), helps illustrate how

the specific-vs.-general canon really works. The question there was whether pretrial motion preparation time was automatically excluded from the Speedy Trial Act clock by 18 U.S.C. § 3161(h)(1), which directed exclusion of "delay resulting from * * * proceedings concerning the defendant." This Court held that preparation time was not automatically excluded under that provision because pretrial motions are one of "eight enumerated subcategories of proceedings" specifically addressed in subsection (h)(1)(D) of the Act, and that subsection directed exclusion of time from the motion's filing through disposition. *Bloate*, 130 S. Ct. at 1352. But the Court did *not* suggest that this specific provision signaled Congress's intent that motion-preparation time should *never* be excluded under any other provision. To the contrary, the Court held that such time "*is* excludable under subsection (h)(7)" of the Act, which authorizes case-by-case exclusions of "[a]ny period of delay" if certain findings are made on the record. 130 S. Ct. at 1352, 1354 (emphasis added). Subsections (h)(1) and (h)(7) both could be applied to pretrial motions, but that did not mean that the former necessarily trumped the latter. Similarly, Rule 54(d) and Section 1692k(a)(3) *both* authorize certain costs to certain defendants in specified circumstances. It does not follow that, just because one is specific, the other must be general.

In any event, as noted above, Section 1692k(a)(3) does not address "prevailing" defendants with any "specificity." Rather, the provision authorizes costs for any "defendant"—prevailing or otherwise—in cases brought in bad faith and for the purpose of harassment. A non-prevailing defendant (such as one

benefiting from a voluntary dismissal) might receive attorney's fees and costs under Section 1692k(a)(3), and *most* prevailing defendants (including respondent) do not receive attorney's fees and costs under that section. Section 1692k(a)(3) cannot fairly be described as providing the "exclusive" basis for cost awards to "prevailing FDCPA defendants," U.S. Br. 18, 19, when it addresses a category of defendants both narrower and broader than those who prevail.[2]

3. Petitioner contends that, because Section 1692k(a)(3) "states other circumstances than" those described in Rule 54(d), it necessarily "provides otherwise." Pet. Br. 16. But "provides otherwise" means just that: The statute must be *contrary* to, or inconsistent with, Rule 54(d). Section 1692k(a)(3), however, just says something in *addition* to Rule 54(d)—*i.e.*, that a defendant may recover costs, as well as attorney's fees, if an FDCPA action was brought in bad faith and for the purpose of harassment. The mere fact that Section 1692k(a)(3) speaks, in part, to "other circumstances than" Rule 54(d) does not render it contrary to Rule 54(d). "May" does not mean "and otherwise may not." See Resp. Br. 17-18 (cookies-and-milk example).

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[2] The reliance by the government (at 18-19) and petitioner (at 10-11) on *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), is misplaced. There, the Court held that a statute providing that a person "may" seek contribution under certain conditions set forth the sole conditions for contribution under that statute. But the Court noted that other causes of action for contribution could exist independently of the statute. *Id.* at 166-67 (explaining that the statute's saving clause simply "clarif[ied]" that other causes of action for contribution remained intact).

Indeed, petitioner's sweeping rule (Pet. Br. 16-17)—that any statute that "states other circumstances than" Rule 54(d) necessarily displaces Rule 54(d)—would have far-reaching consequences. Many cost-shifting statutes "state other circumstances than" Rule 54(d). For example, 28 U.S.C. § 1927 provides that "[a]ny attorney * * * who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Does the statute's reference to "costs" in "other circumstances than" Rule 54(d) mean that it displaces Rule 54(d)'s authorization of costs to prevailing parties in the absence of vexatious litigation conduct? Of course not. Like Section 1692k(a)(3), Section 1927 simply provides an additional authorization of costs in certain circumstances. It does not displace Rule 54(d) by implication merely because it mentions the word "costs."

Congress knows how to "provide[] otherwise." If it wanted to provide that an FDCPA defendant could not recover costs "unless" the action was brought in bad faith and for the purpose of harassment, it would have said so—just as it has in other statutes. *E.g.*, 28 U.S.C. § 1928 (providing that "no costs shall be included in such judgment, unless the proper disclaimer has been filed"). See Resp. Br. 18-20. The fact that Congress did not do so here lends further support to the conclusion that Section 1692k(a)(3) merely supplements—and does not supplant—Rule 54(d).

II. DENYING COSTS TO PREVAILING DEFENDANTS WOULD UNDERMINE THE PURPOSES OF THE FDCPA AND FURTHER ENCOURAGE MERITLESS LAWSUITS

The FDCPA reflects a "calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Urlich LPA*, 130 S. Ct. 1605, 1624 (2010). At the same time, Congress sought to ensure "that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Consistent with that goal, the FDCPA contains "several provisions that expressly guard against abusive lawsuits" targeting law-abiding debt collectors. *Jerman*, 130 S. Ct. at 1620. The FDCPA therefore strikes a careful balance between two equally important policy objectives: encouraging legitimate lawsuits while discouraging meritless ones.

Petitioner's rule would undermine that careful balance. Plaintiffs' attorneys already file a staggering number of FDCPA cases each year. Foreclosing cost awards to prevailing defendants would exacerbate the problem by removing even that modest disincentive to the filing of still more meritless lawsuits against law-abiding debt collectors.

A. Law-Abiding Debt Collectors Face An Onslaught Of Meritless FDCPA Lawsuits, With High Costs For Small Businesses And Consumers

1. Petitioner warns that the mere prospect of cost awards for prevailing defendants would chill FDCPA lawsuits. Pet. Br. 15. The government likewise

intones that "[a]pplication of Rule 54(d)(1)'s default cost-shifting standard * * * would significantly alter the mix of incentives [supposedly] fashioned by Congress and could deter many meritorious private suits." U.S. Br. 24. The government's suggestion that *meritorious* lawsuits are chilled by the standard American system of presumptively requiring payment of costs to the *prevailing* party is dubious in theory, but the greater problem with the government's and petitioner's arguments is empirical, not theoretical. There is no shortage of FDCPA actions, and a rule of law that would encourage *even more* such lawsuits has nothing to recommend it.

As numerous authorities have recognized, law-abiding debt collectors currently face an onslaught of FDCPA suits. See *Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (noting the "proliferation of litigation" under the Act) (internal quotation marks omitted); *Jacobson* v. *Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006) (observing the "exponential growth in litigation under the statute"). Although many of those lawsuits are entirely devoid of merit, plaintiffs' attorneys can often extract settlements from law-abiding debt collectors who face greater expense from litigating such nuisance suits than from settling them.

The sheer number of FDCPA suits brought each year is staggering—and has increased at an alarming rate. In 2011 alone, plaintiffs filed more than 12,000 FDCPA cases in the district courts—up from 3215 in 2005.[3] And filed cases are just the tip of the iceberg:

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[3] Collections Recon, 2011 Litigation Statistics Revised Upward, FDCPA Suits Surpass 12,000, Feb. 24, 2012, available at

"[A]ttorneys often threaten to sue if they are not paid a quick settlement, knowing the cost of defending an FDCPA claim can easily reach $10,000 or more." William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 562 (2010). The government openly acknowledges that in the context of the FDCPA "even successful suits may produce recoveries that are small in relation to the defendants' costs" (U.S. Br. 26)—which is, of course, the exact problem that creates the incentive to bring meritless suits just to extract quick settlements—yet somehow concludes that applying Rule 54 therefore has great potential "to deter *meritorious* claims" (*ibid.* (emphasis added)). Experience shows that the ability to bring FDCPA lawsuits seeking recoveries small in relation to defense costs creates tremendous incentives *to bring* lawsuits (often without regard to merit), not the disincentives the government suggests.

A disproportionate number of those lawsuits are brought (and threats to sue made) by just a handful of attorneys. Indeed, in recent years a "cottage industry" of high-volume FDCPA lawyers has taken root. *Murphy* v. *Equifax Check Services, Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn. 1999). Petitioner's trial attorney, for example, filed more than 350 FDCPA complaints in 2011—nearly 3% of all FDCPA

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http://www.collectionsrecon.com/latestnews/collection_news/2011-litigation-statistics-revised-upward-fdcpa-suits-surpass-12000/; Collections Recon, FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap, Jan. 12, 2012, available at http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-full-year-2011-recap/.

lawsuits nationwide that year.[4] It is difficult to imagine how an individual attorney who files 350 federal lawsuits annually—many more lawsuits than there are workdays in a year—could thoroughly investigate each plaintiff's claims to ensure their merit. Indeed, the U.S. District Court for the District of Colorado recently rebuked petitioner's trial attorney for filing hundreds of FDCPA complaints that simply recycle the same language:

> Plaintiffs' counsel filed 382 other cases under the FDCPA in this Court. In each case, as here, counsel alleged that the plaintiff(s) suffered from "economic loss, loss of self-esteem and peace of mind, and has suffered emotional distress, humiliation, and embarrassment." * * * I do find it troubling that counsel used the same language in every case to describe an injury that is very individualized and will differ from plaintiff to plaintiff.

Burns v. *Anderson, Crenshaw & Associates, L.L.C.*, No. 07-cv-01192, 2008 WL 8834614, at *7 n.5 (D. Colo. Aug. 15, 2008) (granting defendant's motion for summary judgment).[5]

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[4] See Resp. Br. 41 (citing PACER records); see also Collections Recon, FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap.

[5] The U.S. District Court for the District of Colorado, where petitioner filed her lawsuit, is a particularly fertile ground for FDCPA lawsuits. In 2011, plaintiffs' attorneys filed nearly 650 FDCPA complaints there—more than in any other district. See Resp. Br. 41 (citing PACER records); see also Collections Recon, FDCPA and Other Consumer Lawsuit Statistics, Full Year 2011 Recap.

What is more, petitioner's trial counsel has adopted a strategy designed to maximize the difficulty and expense of responding to these lawsuits. Mr. Larson has filed more than 1600 FDCPA lawsuits for Colorado consumers since 2005. To our knowledge, *not one* of those lawsuits was filed against a Colorado collection agency. The explanation is simple: Colorado agencies often have established relationships with local attorneys or employ an in-house lawyer who can appear on the agency's behalf. Mr. Larson's out-of-state targets, however, must bear the additional distraction and expense of finding and hiring local counsel to appear in Colorado courts. Not surprisingly, those defendants are that much more motivated to offer him a quick settlement.

Mr. Larson is not alone in employing such tactics. It is not uncommon for an individual attorney to file hundreds of FDCPA cases in a single year—or for a small law firm to file nearly a thousand. At the same time, "judicially developed standards have enabled a class of professional plaintiffs" who team up with FDCPA attorneys to mount multiple law suits—often class actions—against debt collectors. *Fed. Home Loan Mortg. Corp.* v. *Lamar*, 503 F.3d at 514 (internal quotation marks omitted).

Courts have recognized, moreover, that "[t]he cottage industry that has emerged does not bring suits to remedy" the abusive debt-collection practices that were the impetus for the Act's passage. *Id.* at 513 (internal quotation marks omitted). Rather, plaintiffs' lawyers routinely bring "lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 514 (internal quotation marks omitted).

Indeed, FDCPA attorneys make no bones about their business model. For example, one well-known FDCPA lawyer has had great success selling admission to "FDCPA Boot Camp," a training program for lawyers seeking to build a business based on suing debt collectors. That course instructs aspiring FDCPA lawyers that "*[e]very* collection account is destined to become an FDCPA claim"—apparently with little regard to whether the debt collector has actually violated the Act.[6] Under joint marketing agreements, firms specializing in FDCPA lawsuits attract clients through a variety of websites that funnel potential clients to particular law firms based on geographic region.[7] Often, individuals are directed to these client-recruitment sites simply by typing a debt collection firm's name into an internet search engine. Those marketing efforts appear to be highly effective. One plaintiff, for example, filed 10 FDCPA complaints in the U.S. District Court for the Southern District of Florida in a span of less than 3 months.[8]

But meritless cases are often nonetheless successful ones. That is because the endgame is

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[6] Peter F. Barry, The FDCPA Boot Camp, at 2, available at http://www.lawpoint.com/images/lawpoint/brochure.pdf (emphasis added).

[7] *E.g.*, http://www.fairdebtforconsumers.com/; http://www.attorneysforconsumers.com/fair-credit-process.html.

[8] See 10-cv-61300 (July 26, 2010); 10-cv-61307 (July 27, 2010); 10-cv-61312 (July 27, 2010); 10-cv-61316 (July 27, 2010); 10-cv-61354 (July 30, 2010); 10-cv-61358 (July 30, 2010); 10-cv-61359 (July 30, 2010); 10-cv-61469 (Aug. 15, 2010); 10-cv-61696 (Sept. 14, 2010); 10-cv-62003 (Oct. 19, 2010).

almost always a quick settlement, not a verdict. As noted above, the cost of successfully defending a nuisance lawsuit—tens of thousands of dollars in legal fees—far exceeds the cost of settlement (typically between $2,500 and $7,500). Law-abiding debt collectors therefore have a strong economic incentive to settle even meritless claims. See *Berther* v. *TSYS Total Debt Mgmt., Inc.*, No. 06-C-293, 2007 WL 1795472, at *4 (E.D. Wis. Jun 19, 2007) ("[I]t is the avoidance of attorney[']s fees that undoubtedly serves as the primary motivating factor in pushing defendants into settlements."); Hoffman, 29 ST. LOUIS U. PUB. L. REV. at 562 ("for a collection agency, it is more cost effective to pay a settlement"); Lynn A.S. Araki, *Rx For Abusive Debt Collection Practices: Amend The FDCPA*, 17 U. HAWAII L. REV. 69, 105-06 (1995). Indeed, web sites designed to attract FDCPA plaintiffs tout that "[l]ess than 1% of all cases go to trial."[9] As the Seventh Circuit observed, moreover, plaintiffs' attorneys are particularly adept at using "the class action as a device for forcing the settlement of meritless claims"—a practice the court described as the "mirror image of the abusive tactics of debt collectors at which the statute is aimed." *White* v. *Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

Courts have repeatedly recognized, moreover, that even those cases that do not yield an immediate settlement serve primarily to benefit plaintiffs' lawyers—not consumers. Plaintiffs' lawyers "have a strong incentive to litigate these cases * * * in the

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[9] http://www.attorneysforconsumers.com/fair-credit-process.html; http://www.fairdebtforconsumers.com/ask-questions-form.html.

form of attorneys' fees and costs they hope to recover." *Sanders* v. *Jackson*, 209 F.3d 998, 1003 (7th Cir. 2000); see Araki, 17 U. HAWAII L. REV. 69, 105-06 (noting that "it often is cost free for their clients to try a case for a nominal verdict" while "it costs the defendant his own attorney's fees"). Unfortunately, the "history of FDCPA litigation shows that most cases have resulted in limited recoveries for plaintiffs and hefty fees for their attorneys." *Sanders*, 209 F.3d at 1004; see *Berther*, 2007 WL 1795472, at *4 ("FDCPA cases appear to be much more about attorney[']s fees than the prosecution of consumer rights."). In *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000), for example, a negotiated settlement provided $2000 to the class representative; $78,000 to the plaintiffs' attorneys; and nothing for the other class members. What is more, "the underlying debt—the reason the consumer is being called in the first place—nearly always remains intact."[10]

2. While the benefits to consumers are often illusory, the harm to law-abiding debt collectors, small businesses, and their customers is all too real. Petitioner and her *amici* portray debt collectors as unscrupulous actors who serve no purpose but to harm struggling consumers. See, *e.g.*, AARP Br. 14. That misleading caricature overlooks the critical role responsible third-party debt collectors play in our

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[10] David Migoya, *Consumers Dealing with Debt Collectors Become Stuck in a Vicious Cycle of Lawsuits*, DENVER POST, Feb. 27, 2011, available at http://www.denverpost.com/business/ci_17488098.

economy—and the wider costs of meritless FDCPA lawsuits.

As the Consumer Financial Protection Bureau has explained elsewhere, "[c]onsumer debt collection is critical to the functioning of the consumer credit market." CFPB Annual Report 2012, Fair Debt Collection Practices Act at 4, available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. By collecting delinquent debt, debt collectors help make credit more affordable to consumers, enabling them "to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase." *Ibid.*

Small businesses in particular rely on the debt-collection industry. Smaller businesses often lack the resources to collect outstanding debts. They therefore rely on third-party debt collectors—providing cash flow that is critical for the health of those businesses and for the workers they employ. Hoffman, 29 ST. LOUIS U. PUB. L. REV. at 556-57. Consumers, too, benefit—not just from more available and affordable credit, but also from lower prices. By allowing businesses to keep the costs of their goods and services lower, third-party debt collection results in an annual savings of nearly $400 per household.[11] Of course, "collection agencies are forced to charge businesses more in order to offset the risk of an FDCPA lawsuit"—costs that are ultimately passed on to consumers. *Id.* at 562.

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[11] ACA International, Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis, June 12, 2008, available at http://www.acainternational.org/images/12546/pwc2007-final.pdf.

Debt-collection businesses directly provide 150,000 American jobs—and indirectly provide another 150,000.[12] Although ACA International's 5000 member agencies range in size from small businesses to large corporations, the average debt-collection agency employs just 25 workers. The cost of defending just one or two meritless lawsuits can therefore have a severe impact on such a small business. It is scarcely surprising that plaintiffs' attorneys are often successful at coercing law-abiding debt collectors to settle.

But Congress enacted the FDCPA to curtail abusive debt-collection practices, not to punish law-abiding debt collectors or burden a critical industry with a flood of meritless nuisance suits. Congress expressly declared "that those debt collectors who refrain from using abusive debt collection practices" should not be "competitively disadvantaged" by the FDCPA. 15 U.S.C. § 1692(e). As discussed below, however, petitioner's flawed interpretation of Section 1692k(a)(3) would eliminate even the possibility of a cost award to prevailing defendants—exacerbating what are already significant incentives for plaintiffs' attorneys to bring meritless FDCPA claims.

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[12] See ACA International, The Impact of Third-Party Debt Collection on the National and State Economies, available at http://www.acainternational.org/images/21594/2012acaeyhandout.pdf.

B. Rule 54(d) Cost Awards For Prevailing Defendants Are Necessary To Deter Frivolous FDCPA Lawsuits—And Would Not Chill Meritorious Suits

Petitioner contends that awarding costs to prevailing defendants would thwart congressional intent by chilling legitimate FDCPA suits. Pet. Br. 15. But even if that policy argument could trump the plain language of Rule 54(d) and Section 1692k(a)(3)—and it cannot—it rests on a faulty premise. The only lawsuits that would be deterred by cost awards to prevailing defendants are those *least* likely to be meritorious—precisely the types of suits Congress sought to deter.

The government's brief illustrates the point. It argues that, if unsuccessful plaintiffs faced the prospect of paying defendants' costs, "private FDCPA enforcement actions would be economically rational only if the perceived likelihood of success was very high." U.S. Br. 25. But that is precisely the point: It *shouldn't* be economically rational for plaintiffs to bring lawsuits that have little or no chance of succeeding. Such suits serve only to clog the courts with meritless cases, competitively harm law-abiding debt collectors in direct contravention of a declared purpose of the Act, and enrich lawyers—all with little impact on the abusive debt-collection practices Congress sought to stem.

Section 1692k(a)(3) already reflects an asymmetry in the treatment of prevailing plaintiffs and defendants. Prevailing plaintiffs receive statutory damages as a matter of course (even in the absence of actual injury), and attorney's fees as a matter of

course. By contrast, defendants receive attorney's fees only upon showing that the plaintiff acted in bad faith *and* for the purpose of harassment. Petitioner, however, would tip the scale even further—and well beyond the carefully "calibrated scheme" crafted by Congress. *Jerman*, 130 S. Ct. at 1624. As petitioner acknowledges, "cost awards 'almost always amount to less than the successful litigant's total expenses.'" Pet. Br. 15 (quoting *Taniguchi*, 132 S. Ct at 2006). By foreclosing cost awards to prevailing defendants, petitioner would remove what is, by her own account, the most modest check on meritless lawsuits.

Petitioner and her *amici* counter that meritless suits are adequately deterred by Section 1692k(a)(3)'s authorization of costs in actions that were "brought in bad faith and for the purpose of harassment." But that double-subjective standard "is a particularly difficult standard to meet." *Branco* v. *Credit Collection Servs., Inc.*, No. 10-cv-03490 at * 1, 2012 WL 1143562 (E.D. Cal. Apr. 4, 2012). That is because it is not enough for a defendant to show that the lawsuit was meritless (or even frivolous). Rather, he must show (1) that the claim was without merit; (2) that the plaintiff knew or should have known that it was without merit (*i.e.*, that it was brought in bad faith); *and* (3) that the plaintiff brought the action specifically to harass the defendant. See *Sanchez* v. *United Collection Bureau, Inc.*, 649 F. Supp. 2d 1374, 1382 (N.D. Ga. 2009) ("The standard for bad faith [under the FDCPA] is higher than the standard for mere frivolousness."); see also *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978) (explaining that an action can be "frivolous,

unreasonable, or without foundation, even though not brought in subjective bad faith").

In other words, there is a huge category of claims that are frivolous but that nevertheless fail to satisfy the bad faith-plus-harassment standard. *E.g.*, *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 940-41 (9th Cir. 2007) (holding that, even though the court was "skeptical" of lawyer's claims and found his "aggressive use of the Act unworthy of commendation," insufficient evidence existed "to support a finding that [plaintiff's] claims were necessarily brought in bad faith"). The remaining modest deterrent to such meritless lawsuits is the possibility of cost awards to prevailing defendants—a deterrent that petitioner would remove by rewriting 1692k(a)(3) to displace Rule 54(d).

Although the government repeatedly touts (U.S. Br. 2, 28) the FDCPA's "good faith" and "bona fide error" defenses, that is scant comfort to law-abiding debt collectors. First of all, petitioner's and the government's rule would apply to defendants—like respondent GRC—that prevail on the ground that they did nothing illegal at all, not on defenses of "good faith" or "bona fide error." Moreover, a good-faith defendant has—by definition—acted in good faith, yet it would still need to endure costly litigation. And, to recover attorney's fees, the defendant would need to show that the plaintiff's allegation that the defendant was not acting in good faith was itself brought in bad faith and for the purpose of harassment—a nearly impossible standard to satisfy.

For her part, petitioner suggests that it would be unjust to award costs to a defendant who successfully asserts the "bona fide error" defense "based on facts known only to the defendant prior to suit." Pet. Br. 15. But Section 1692k(a)(3), properly construed, does not *compel* courts to award costs to prevailing defendants. Rather, Section 1692k(a)(3) simply leaves intact Rule 54(d), which creates a presumption of—but does not mandate—cost-shifting to prevailing parties. Courts therefore retain discretion to deny costs if "there would be an element of injustice in a cost award"—though petitioner did not seek such discretionary relief in this case. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 355 n.14 (1981); see *Taniguchi*, 132 S. Ct. at 2001 (noting that Rule 54(d) "gives courts the discretion to award costs to prevailing parties"). In light of that discretion, the mere possibility that a defendant in a particular case will benefit from the "bona fide error" defense is little reason to penalize all prevailing defendants by denying them costs.

And denial of costs is unquestionably a penalty. "[B]y the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs." *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 387 (1884). Rule 54(d) codifies that principle, establishing a presumption in favor of awarding costs to prevailing parties. Such costs are awarded "'as incident to the judgment.'" *Buckhannon*, 532 U.S. at 611 (Scalia, J., concurring) (quoting *The Baltimore*, 75 U.S. (8 Wall.) 377, 390 (1869)). As the court of appeals recognized here, the denial of that "incident to the judgment" therefore constitutes "'a

severe penalty'" to the prevailing party. Pet. App. 14a (quoting *Klein* v. *Grynberg*, 44 F.3d 1497, 1507 (10th Cir. 1995)).

It is difficult to imagine why Congress would want to impose such a "severe penalty" on debt collectors whose sole offense was that they *won* a judgment clearing them of wrongdoing. As noted, foreclosing cost awards to prevailing parties will incentivize plaintiffs' attorneys to bring still more meritless FDCPA cases. Such cases will, by definition, disproportionately be filed against law-abiding, rather than law-breaking, debt collectors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROY T. ENGLERT, JR.*
MARK T. STANCIL
DANIEL N. LERMAN
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

**Counsel of Record*

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AMICUS CURIAE BRIEF

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SUPREME COURT, U.S.
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Supreme Court of the United States

OLIVEA MARX,

Petitioner,

v.

GENERAL REVENUE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS IN SUPPORT OF RESPONDENT

DONALD S. MAURICE, JR., ESQ.
MAURICE & NEEDLEMAN, P.C.
5 Walter E. Foran Blvd., Ste. 2007
Flemington, NJ 08822
dsm@mnlawpc.com
(908) 237-4570
Counsel for Amicus Curiae
National Association of
Retail Collection Attorneys
September 17, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The National Association of Retail Collection Attorneys respectfully submits this *amicus curiae* brief in support of Respondent.[1]

STATEMENT OF IDENTITY AND INTEREST IN THE CASE.

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of debt collection law. NARCA members include over 700 law firms located in all fifty states, all of whom must meet association standards designed to ensure experience and professionalism. NARCA member attorneys are subject to the various Codes of Professional Ethics adopted in the jurisdictions where they are licensed to practice law. NARCA has adopted a Code of Professional Conduct and Ethics which imposes professional standards beyond the requirements of state codes of ethics and regulations that govern attorneys.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

NARCA members are regularly retained by creditors to lawfully collect delinquent debts. In the exercise of their professional skills in the practice of debt collection law they are often subject to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, et seq. As the only national trade association dedicated solely to the needs of attorneys engaged in debt collection, NARCA has a significant interest in ensuring that the FDCPA is interpreted in a manner consistent with their members' professional responsibilities to their clients, the courts, their adversaries and the general public.[2]

NARCA supports the position of the debt collector in this matter and urges this Court to find that where a person files a lawsuit invoking the protections of the FDCPA and does not prevail, the debt collector/defendant be awarded its costs in defending the litigation as a prevailing party, a principle firmly rooted in American jurisprudence.

SUMMARY OF ARGUMENT

The court of appeals' holding correctly applied Fed. R. Civ. P. 54(d)(1) to the taxation of costs to a

[2] NARCA has previously participated as *amicus curiae* in other cases involving the interpretation of the FDCPA. (*See, e.g.*, *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130 (2d Cir. 2010); *Guerrero v. RJM Acquisitions, L.L.C.*, 499 F.3d 926 (9th Cir. 2007).

person who unsuccessfully claimed a debt collector violated 15 U.S.C. §§ 1692, et seq., the Fair Debt Collection Practices Act. Federal courts have noted a "cottage industry" has developed which has flooded the courts with actions under the Fair Debt Collection Practices Act. Courts observe that many of these cases allege technical violations with no actual damages, but are driven by outrageous attorney's fee demands.

A. The Fair Debt Collection Practices Act (also referred to herein as the "FDCPA") is a fee shifting statute which makes a debt collector liable for her conduct even in the absence of actual damage. 15 U.S.C. § 1692k(a). In addition, it requires the debt collector to pay the plaintiff's "reasonable attorney's fee." 15 U.S.C. § 1692k(a)(3). Courts have recently observed a growing number of FDCPA cases which are maintained simply to increase the award of attorney's fees. Technical violations seeking pre-suit demands of $3,000 to $5,000 are routinely made to NARCA members. When the demands are accompanied by patently unsustainable claims, debt collectors may choose to litigate in an effort to stem the tide of outrageous FDCPA demands. When debt collectors do prevail in contesting these specious cases, they should not be penalized by denying them their taxable costs, especially when the suit was continued simply to enhance attorney's fees.

B. Fed. R. Civ. P. 54(d)(1) provides that a prevailing party "should be allowed" to recover its "costs." Rule 54(d)(1). Courts interpret Rule 54(d)(1)

as creating a presumption that a prevailing party will recover its costs. *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007). Costs are not recoverable under Rule 54(d)(1) when a federal statute "provides otherwise." Rule 54(d)(1). The FDCPA does not provide otherwise. When an action under the Fair Debt Collection Practices Act has been found by a court to have been "brought in bad faith and for the purpose of harassment . . . " it may impose "attorney's fees reasonable in relation to the work expended and costs . . . " upon a showing that a case was "brought in bad faith and for the purpose of harassment . . . " 15 U.S.C. § 1692k(a)(3). Section 1692k(a)(3) solely concerns when a court may impose attorney's fees and costs, together. It does not prohibit the imposition of costs, alone, under Rule 54(d)(1) in other circumstances.

ARGUMENT

I. THE FDCPA IS REGULARLY ABUSED TO GENERATE ATTORNEY'S FEES AND DEBTORS ARE OFTEN UNKNOWING PARTICIPANTS TO THE SCHEME.

In 1977, Congress passed the Fair Debt Collection Practices Act for the purpose of eliminating abusive, deceptive and unfair debt collection practices by third party debt collectors. 15 U.S.C. § 1692(a). Initially, attorneys at law representing clients were exempt from coverage, however, the exemption was repealed in 1986. *See* Pub. L. No. 99-361.

Because the FDCPA has been interpreted by this Court and others as a strict liability statute, debt collection lawyers are frequently subject to FDCPA lawsuits even where the debtor has suffered no actual damage as a result of alleged misstatements in a pleading or a debt collection letter. *See, e.g.*, *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 652 (3d Cir. 1993), *Nero v. Law Office of Sam Streeter, P.L.L.C.*, 655 F. Supp. 2d 200, 210 (E.D.N.Y. 2009); *Navarro v. Eskanos & Adler*, No. C 06-02231, 2007 U.S. Dist. LEXIS 15046 (N.D. Cal. Feb. 20, 2007).

Members of this Court have commented on the "cottage industry" that has developed in prosecuting no damage FDCPA cases. *Jerman v. Carlisle*, 130 S. Ct. 1605 (2010). The Second Circuit, too, has recognized that FDCPA lawsuits are principally driven by a desire to enhance attorney fee awards. *Jacobson v. Health Care Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008); *see also Zavodnick v. Gordon & Weisberg, P.C.*, Civ. No. 10-7125, 2012 U.S. Dist. LEXIS 78868, at **1-5 (E.D. Pa. June 6, 2012) (Request made for $10,136.50 in fees and costs, but awarded only $3,703.00, where plaintiff accepted an offer of judgment made six days after defendant filed its answer. The Court noted "It appears that [plaintiff's counsel] actually performed precious little original work on Plaintiff's behalf. As disturbing are [plaintiff's counsel's] specious arguments and evidence, which Courts in this Circuit have repeatedly and decisively rejected . . . "); *Arlozynski v. ARS Nat'l Servs.*, Case No. 8:11-CV-196-27MAP, 2012 U.S. Dist. LEXIS 94429 (M.D.

Fla. June 5, 2012) (Following acceptance of offer of judgment, fee request of $6,265.00 reduced to $878.50); *Cotner v. Buffaloe & Assocs., PLC*, No. 3:11-CV-299, 2012 U.S. Dist. LEXIS 67161 (E.D. Tenn. May 14, 2012) (Fee request of $7,232.50 denied and award made for fees of $2,415.35, where Plaintiff accepted an offer of judgment for $1,001 in damages); *Pierson v. Gregory J. Barro, PLC*, No. 3:11-CV-312, 2012 U.S. Dist. LEXIS 67163 (E.D. Tenn. May 14, 2012) (Defendant made offer of judgment for damages of $750 and attorney's fees and costs before filing an answer, which was later accepted. Plaintiff's request for $4,765.00 in attorney and "support staff fees" reduced by the court to $2,056.91).

Federal District Courts in New Jersey have expressed particular concern at what they observe as the use of FDCPA claims for abusive purposes:

> Although the fees in dispute are relatively small, the integrity of the billing process in small Fair Debt cases is called into question. Often, the law firms involved on both sides are the same. This Court has observed that liability is commonly resolved immediately and the real dispute presented to the federal court is about legal fees. Deciding the fee issue can be time consuming, even though the sums in dispute are often similar to numbers handled by small claims courts.

Weed-Schertzer v. Nudelman, Klemm & Golub, 2011 U.S. Dist. LEXIS 108928, 2011 WL 4436553 (D.N.J.

Sept. 23, 2011), *adopted at*, 2011 U.S. Dist. LEXIS 119340, 2011 WL 4916309 (D.N.J. Oct. 13, 2011).

Despite this warning, Federal District Courts in New Jersey continued to be flooded with FDCPA cases involving nominal damage claims seeking ridiculous attorney's fees demands.[3] Four months following *Weed*, in *Cohen v. Am. Credit Bureau, Inc.*, 2012 U.S. Dist. LEXIS 33687 (D.N.J. Mar. 13, 2012), *adopted at, Cohen v. Am. Credit Bureau, Inc.*, 2012 U.S. Dist. LEXIS 73846 (D.N.J. May 29, 2012), the plaintiff alleged a violation of the FDCPA in connection with a single telephone call which failed to state the amount of the debt, despite her having already received three letters where the debt amount was disclosed. *Id.* at *1. The debtor retained an attorney, who happened to be her husband. *Id.* at *2. Prior to filing her complaint, the defendant made what the court described as "the equivalent of" a Fed. R. Civ. P. 68 offer of judgment. Plaintiff did not accept the offer, and instead threatened to file 14 separate federal FDCPA lawsuits each seeking separate attorney's fee awards. *Id.*[4] As the court observed, the

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[3] "The Court inquired into the number of Fair Debt cases filed in each of the past four years. Jack O'Brien, Esq., Chief Deputy of Court Operations, indicated that there has been a consistent increase in the number of FDCPA filings from 2008 through 2011. More specifically, in this district there were 182 FDCPA cases filed in 2008; 238 cases filed in 2009; 364 cases filed in 2010; and 683 cases filed in 2011." *Id.* at *3, n. 1

[4] "For the sake of clarity, the Court notes that Plaintiff's objection misconstrues the R&R. The R&R specifically finds that

(Continued on following page)

purpose to proceed with litigation was not to resolve a wrong, but,

> [Plaintiff's attorney's] intention – expressed to the Court, his adversary, and in the papers submitted on this motion – was to use his wife's case to "make law." (Def.'s Ex. 3; CM/ECF No. 24-4.) Apparently the "law" he sought to make was to establish the right to bring 14 separate subsequent lawsuits – each one targeting a single one of the 14 alleged violations – even though many of the supposed violations were quite technical and apparently occurred during the same telephone message and all involved the same $150 debt.

Cohen, 2012 U.S. Dist. LEXIS at *8.

While the court viewed these threats as improper and not within the spirit of the FDCPA, an award of attorney's fees, albeit only $1,046.75, was allowed. *Id.* at *45.

The facts in *Cohen* are typical of the progression of FDCPA claims. Technical violations seeking pre-suit demands of $3,000 to $5,000 are routinely made to NARCA members. When the demands are accompanied by patently unsustainable claims, debt collectors may choose to litigate in an effort to stem the tide of obscene FDCPA demands. When debt collectors do

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Plaintiff's 'threat of successive lawsuits borders on bad faith' not that Plaintiff actually acted in bad faith." *Id.* at **3-4.

prevail in contesting these specious cases, they should not be penalized by denying them their taxable costs, especially when the entire suit was frivolous. In *Shand-Pistilli v. Prof'l Account Servs.*, 2011 U.S. Dist. LEXIS 64446 (E.D. Pa. June 16, 2011), a lawsuit claiming a debt collector made numerous harassing, oppressive and abusive calls, the plaintiffs testified that the debt collector was actually "polite," did not abuse them, nor use profane language. In fact, the only profanity uttered was by one of the plaintiffs. *Id.* at *6. Despite the debt collector being described by the plaintiffs as "polite" and having never uttered an offensive or abusive statement or conducted themselves in an abusive or oppressive manner, the court declined to impose fees or costs under 15 U.S.C. § 1692k(a)(3) because plaintiffs (themselves) did not believe their action to be without merit or was motivated to harass. *Id.* at *19. Plaintiffs believed that these calls, which were polite and professional, were still harassment, despite the fact that the court found otherwise and dismissed the FDCPA lawsuit. *Id.*

Section 1692k(a)(3) provides a sanction based on the intent of the plaintiff in *bringing* the claim. It does not address the totality of the litigation the plaintiff or her counsel may pursue or that the plaintiff's beliefs in asserting a claim are contrary to well settled law. Courts recognize that many FDCPA claims are *maintained* solely for the purpose of enhancing fees, rather than affecting the salutary purposes of the FDCPA. If Section 1692k(a)(3) provides a free pass to maintain harassing suits without

consequence, FDCPA plaintiff's lawyers will continue to advance their exaggerated demands without fear of any repercussion. Because there is no concern with the imposition of costs, the result is the multiplication of FDCPA lawsuits which have transformed Federal Courts into small claims courts tasked to resolve outrageous demands concerning nominal claims.

II. RULE 54(d) ALLOWS TAXATION OF COSTS IN FDCPA CASES BECAUSE IT ENCOMPASSES THE MAINTENANCE OF A LAWSUIT.

Fed. R. Civ. P. 54(d)(1) provides that a prevailing party "should be allowed" to recover its "costs." Rule 54(d)(1). Courts interpret Rule 54(d)(1) as creating a presumption that a prevailing party will recover its costs. *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007); *McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006); *In re Derailment Cases*, 417 F.3d 840, 844 (8th Cir. 2005); *Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1038 (9th Cir. Cal. 2005); *United States Bank Trust Nat'l Ass'n v. Venice Md LLC*, 92 Fed. Appx. 948, 956 (4th Cir. 2004). To overcome the presumption, the opposing party must identify "good reason" for denial of a cost award. *Janis v. Biesheuvel*, 428 F.3d 795, 801 (8th Cir. 2005); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 623 (4th Cir. 1978). "Costs" which may be recovered under Rule 54(d) are delineated by 28 U.S.C. § 1920 and are strictly limited to those delineations. *Crawford Fitting Co. v. J. T.*

Gibbons, Inc., 482 U.S. 437, 441-442, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).

Costs are not recoverable under Rule 54(d)(1) when a federal statute "provides otherwise." Rule 54(d)(1). 15 U.S.C. § 1692k(a)(3), however, does not address the ordinary circumstance when a defendant prevails in defending a suit; the statute simply provides for the recovery of attorney's fees and costs by a defendant where a suit was brought in bad faith and for harassment. It does not even address the situation where a suit was *maintained* for bad faith and harassment. Nothing in 1692k(a)(3) expressly prohibits the imposition of *costs* alone where a suit is *maintained* to an unsuccessful result. Thus, the imposition of costs and attorney's fees upon the unsuccessful plaintiff under § 1692k(a)(3) will concern her intention in commencing the action. However, once an action is commenced, § 1692k(a)(3) is not a prohibition to the imposition of costs for the continuation of the action. Rule 54(d) must control FDCPA litigation in those instances.

CONCLUSION

For these reasons, NARCA respectfully requests that the Court affirm the decision of the Court below.

Respectfully submitted,

DONALD S. MAURICE, JR., ESQ.
MAURICE & NEEDLEMAN, P.C.
5 Walter E. Foran Blvd., Ste. 2007
Flemington, NJ 08822
dsm@mnlawpc.com
(908) 237-4570
Counsel for Amicus Curiae
National Association of
Retail Collection Attorneys